STATE OF MICHIGAN
SUPREME COURT

ECHELON HOMES, LLC,

Plaintiff/Counter-Defendant/Appellant,

vs. Court of Appeals No. 243112
Trial Court No. 01-029345CZ

CARTER LUMBER COMPANY,

Defendant/Counter-Plaintiff/Appellee.

and

ECHELON HOMES, L.L.LC,

Plaintiff-Counter Defendant/Appellant,

vs. Court of Appeals No. 243180
Trial Court No. 01-029345 CZ

CARTER LUMBER COMPANY,

Defendant-Counter Plaintiff/Appellee.

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CARTER LUMBER COMPANY'S APPLICATION FOR LEAVE TO APPEAL

NOTICE OF FILING

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TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER ECHELON HOMES IS LIABLE FOR ITS AGENT'S FRAUD?

Defendant/Counter Plaintiff/Appellant says "Yes".

Plaintiff/Counter Defendant/Appellee says "No".

II. WHETHER ECHELON HOMES RATIFIED THE WRONGFUL CONDUCT OF ITS AGENT AND THEREFORE IS INDEBTED TO CARTER LUMBER IN THE AMOUNT OF $26,987.82?

Defendant/Counter Plaintiff/Appellant says "Yes".

Plaintiff/Counter Defendant/Appellee says "No".

III. WHETHER THE TRIAL COURT ERRED IN GRANTING ECHELON HOMES' MOTION FOR SUMMARY DISPOSITION DISMISSING PLAINTIFF'S COUNTERCLAIM FOR ACCOUNT STATED SINCE A DISPUTED QUESTION OF AGENCY MUST BE LEFT TO THE JURY.

Defendant/Counter Plaintiff/Appellant says "Yes".

Plaintiff/Counter Defendant/Appellee says "No".

IV. WHETHER CARTER LUMBER DID NOT CONVERT ECHELON'S PROPERTY NOR AID AND ABET MRS. WOOD'S CONVERSION OF ECHELON'S PROPERTY?

Carter Lumber says "Yes".

Echelon Homes says "No".

V. WHETHER CARTER LUMBER DID NOT COMMIT FRAUD?

Carter Lumber says "Yes".

Echelon Homes says "No".

VI. WHETHER CARTER LUMBER IS NOT LIABLE FOR AIDING AND ABETTING WOOD'S BREACHES OF FIDUCIARY DUTY?

Carter Lumber says "Yes".

Echelon Homes says "No".

STATEMENT OF PROCEEDING AND FACTS FOR BRIEF ON APPEAL

Defendant, Carter Lumber Company (hereafter "Carter"), is a lumber and hardware store located in White Lake, Michigan. Plaintiff, Echelon Homes, LLC (hereafter "Echelon"), was a very successful building company specializing in the construction of residential homes in Livingston County, Michigan.

Echelon employed Carmella Wood as their receptionist, secretary, bookkeeper and office manager. Unfortunately, the principals of Echelon, Carol Strange and James T. Hysen, failed to perform a criminal history check on Ms. Wood. If they had, they would have discovered that she had a past criminal conviction for embezzlement. Further, the principals of Echelon did not review Echelon's monthly check transactions or checkbook statements and never had Echelon audited.

While employed at Echelon, Ms. Wood breached her position of trust and began stealing money from Echelon during 1997. The principals did not discover that she had been conducting a fraudulent scheme to take Echelon's money until she went on vacation during the summer of 2000.

While she was away, Mr. Hysen began reviewing Echelon's mail, bank statements and canceled checks. He discovered that Carmella Wood had forged the principals' names to the corporate checks and purchased building supplies for herself and her husband using various corporate credit cards and credit accounts. In particular, Ms. Wood had forged Mr. Hysen;s name to a credit application for Carter Lumber. (Exhibit 1)

From approximately March 24, 1999 until February, 2000, Ms. Wood purchased supplies and materials, using Echelon's credit account, from Carter Lumber in the amount of

approximately $86,987.80. These purchases were made for the remodeling of the home where she and her husband, Michael Wood, resided. Also, Ms. Wood assisted her brother, Ronald Lobenstein, in purchasing material and supplies for his home and other projects on the Echelon account. After discovering Ms. Wood's criminal activity, Echelon reported these activities to the police and she was arrested. On January 29, 2001, she pled guilty to one count of embezzlement from Echelon Homes for over $20,000.00, and four counts of uttering and publishing. (Exhibit 2) On March 12, 2001, the Court sentenced Ms. Wood to a prison term of 24 months to 10 years for the embezzlement and 24 months to 14 years for each of the uttering and publishing convictions. (Exhibit 3)

The Livingston County Circuit Court, shortly after the sentencing, conducted a restitution hearing. At the restitution hearing, Echelon admitted that it was indebted to various creditors as a result of Carmella Wood's actions in the amount of some $600,000.00. In particular, Echelon admitted that it still owed Carter Lumber $26,987.82. (Exhibit 4, which is from Echelon's Notebook of its creditors and debts, Exhibit 5 - James Hysen's deposition testimony, Exhibit 6 - the Restitution Hearing transcript, and Exhibit 7 - Carroll Strange's deposition testimony.)

In addition to going to the police and asking that criminal charges be brought against her, Echelon Homes brought a civil action against a beer and wine store that cashed some of the checks that Ms. Wood drafted; a lawsuit against the bank on which the checks were issued; an action against its Certified Public Accountant, claiming that he committed professional malpractice since he did not review the records and discover Ms. Wood's criminal and fraudulent activity; and a lawsuit against Carter Lumber.

In its Complaint against Carter Lumber, Echelon alleged in Count I that Carter Lumber aided and abetted in conversion since it unlawfully allowed Wood and her co-conspirators to charge tens of thousands of dollars on Echelon's account; Count II, aided and abetted the breach of fiduciary duties; Count III, Carter Lumber converted assets and properties of Echelon to its own use; and Count IV, Carter Lumber committed fraud in that it invoiced Echelon for goods and services which were not provided to Echelon and Carter knew that Echelon would pay the invoiced amount in reliance on the accuracy of the invoices.

In turn, Carter Lumber filed a counterclaim alleging breach of contract and account stated for the remaining amount of the balance due in Echelon's account of $26,987.82 that Echelon admitted it owed (Exhibits 4, 5, 6 and 7) and filed a Motion for Summary Disposition.

After Ms. Wood was released from prison, Defendant took her deposition. Ms. Wood, at her deposition, stated: "No, they (meaning Carter) had no knowledge whatsoever. I scammed them just like I scammed my boss and my husband." Further, Ms. Wood stated that no kickbacks were given to any Carter employees. (Exhibit 8)

Further, Carroll A Strange, a principal for Echelon, was unable to articulate and set forth the evidence to demonstrate that Carter was intentionally involved in assisting Ms. Wood perpetrate the fraud upon Echelon. (Exhibit 7)

Carter brought a Motion for Summary Disposition Pursuant To MCR 2.116(C)(8) and (10) in the Oakland County Circuit Court requesting that Echelon's Complaint be dismissed and that its Counterclaim be granted awarding it $26,987.82. On March 27, 2002, the Court granted Carter Lumber's motion to dismiss Echelon's Complaint. (Exhibit 9) The Court denied Carter's request to grant its motion and enter a judgment against Echelon for the amount claimed in its

Counterclaim for account stated. The Court stated:

> "Well, in analyzing and looking at it, it does -- I'm going to be very candid. It just seems logical that the defendant's request to dismiss the complaint should probably be granted. Primarily, the plaintiff has not provided the Court with any information to show that the defendant acted intentionally." (March 27, 2002 hearing, page 7).

Carter filed a second Motion for Summary Disposition requesting that the Court enter a Judgment as to its counterclaim for account stated in the amount of $26,987.82. In turn, Echelon Homes filed a Motion for Summary Disposition requesting that Carter Lumber's counterclaim for account stated be dismissed since there was no issue of material fact.

The Trial Court, on July 10, 2002, conducted a hearing regarding both parties' motions. The Court, prior to rendering a decision, stated:

> "Well, I mean Echelon made the mistake as it turns out of hiring this bookkeeper who ultimately pled guilty to the embezzlement. She falsified these pleadings and I don't think anybody has disagreed about this. She was pretty darn clever. She falsified documents, she signed checks that she shouldn't have. The documents that she falsified allowed people who were not given the authority from the owners of Echelon, I forget their names now. I forget their names, but the authorized people on the Echelon account with Carter Lumber were her at the end and then the two owners and somebody else; and she had somebody apparently, I'm looking at this in the light least favorable to her, but she had somebody go to Carter Lumber and pick up a load of stuff that Echelon had never ordered if she -- I keep wondering during all of this if she was dong extensive remodeling of her own house. . . But the bottom line is there isn't a question of her malfeasance. On the other hand, Carter Lumber never --it appears from these pleadings that Carter Lumber never checked with the responsible owners at Echelon to determine if the bookkeeper had authority to do all this stuff." (P. 4, July 10, 2002 Tr.)

In response, Carter stated that Echelon went before the Honorable Judge John Latrielle

in Livingston County Circuit Court at Ms. Wood's restitution hearing and admitted they owe $26,987.82 to Carter Lumber. (P. 5, July 10, 2002 Tr.) Carter further argued:

> "They (Echelon) owe the money, in their restitution hearing, said we owe the money, we owe the money to Carter Lumber; and I failed to include the transcript page from Mr. Hysen (sic), the other principal, and he also says --I reviewed his deposition this morning and it states Echelon Homes, I am sorry that's Echelon has an outstanding - - has an outstanding to Carter Lumber of $26,987.82, correct? According to Carter Lumber's paperwork, apparently, yes that is the outstanding balance. So both principals acknowledge the debt. They do into circuit court in a restitution hearing, at Ms. Wood's restitution hearing and they claim that one of the debts that is owed to Carter Lumber from Echelon Homes is that amount." (pp. 5-6, Tr. July 10, 2002 and Exhibit 7).

The Court stated that the issue that it was concerned with was whether an account stated was created by the statements that Echelon made at the restitution hearing. (P. 13, July 10, 2002 Tr.) The Court then granted Echelon's Motion for Summary Disposition dismissing Plaintiff's Counterclaim and denied Carter Lumber's Motion for Summary Disposition requesting a judgment in its favor against Echelon Homes for $26,987.82 based upon the fact that Carter Lumber did not admit any liability at the restitution hearing in the Livingston County Circuit Court. (P. 17, July 10, 2002 Tr.)

Carter objected to the Trial Court's ruling (P. 18, July 10, 2002 Tr.) Carter stated that an issue of material fact was created since Echelon did not file a counter affidavit with its answer to Carter's Counterclaim for Account Stated nor rebut Carter's prima facie counterclaim for account stated. (P. 18, July 10, 2002 Tr.) The Trial Court disagreed. (P. 18, July 10, 2002)

The Court did not address the argument contained in Carter Lumber's motion that Echelon Homes was vicariously liable for its agent's fraud or that Echelon Homes ratified the

wrongful conduct if its agent.

Carter Lumber appealed the Order entered by the Oakland County Circuit Court on July 22, 2002 (Exhibit 10) denying its Motion for Summary Disposition and granting Echelon Homes' Motion for Summary Disposition (Court of Appeals No. 243112).

Echelon Homes appealed the Order entered by the Oakland County Circuit Court on April 25, 2002 granting Carter's Motion for Summary Disposition (Exhibit 9) and dismissing its Complaint. (Court of Appeals No. 243180).

The Court of Appeals consolidated the above for review. On March 30, 2004, the Court of Appeals reversed the Trial Court's Order granting Carter's Motion for Summary Disposition and dismissing Echelon's Complaint. It also affirmed the Trial Court's Order granting Echelon's Motion for Summary Disposition dismissing Carter's Counterclaim. (Exhibit 11)

Carter now submits this Application for Leave to Appeal to this Honorable Court because the issues presented involved legal principles of major significance to this State's jurisprudence.

ARGUMENT

I. ECHELON IS LIABLE FOR ITS AGENTS'S FRAUD.

Echelon employed Carmella Wood as its agent, secretary, bookkeeper and office manager. The principals of Echelon placed her in this position to deal with the public. As a result, Echelon is bound by Ms. Wood's conduct since Echelon cloaked Ms. Wood with apparent authority to do acts that she was not authorized to perform.

The law concerning apparent authority is well established in Michigan. Apparent authority has been defined as:

> "Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform on behalf of the principal, the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it." *Maryland Casualty Company v Moon*, 231 Mich 56; 203 NW2d 885 (1925).

Apparent authority for which a principal may be liable must be traceable to him or her and cannot be established by the acts and conducts of the agent. *LaPointe v Chevrette*, 264 Mich 482; 250 NW 272 (1933).

In determining whether an agent possesses apparent authority to perform a particular act, the court must look to all surrounding facts and circumstances. *Smith v Saginaw Savings & Loan Ass'n*, 94 Mich App 263; 288 NW2d 613 (1979).

The vicarious liability of a principal for an agent's intentional tort includes liability for fraud and other non-physical torts. *1 Restatement Agency 2d*, §219(2)(d), states the master is liable even if the servant is acting outside the scope of employment if the servant purports to act or to speak on behalf of the principal and there was reliance upon apparent authority if he was aided in accompanying the tort by the existence of the agency relationship. A principal who puts a servant or other agent in a position which enables an agent while apparently acting within his authority to commit a fraud upon a third party is subject to liability to such third person for fraud. *1 Restatement Agency 2d*, §201.

In *Central Wholesale Co. v Sefa*, 351 Mich 17; 87 NW2d 94 (1957), the court cited *Story on Agency (9th Ed.)* Sec. 443 which states:

> "But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made

> under his expressed or implied authority. It extends further, and binds the principal in all cases where the agent is acting within the scope of his usual employment, or has held out to the public or to the other party, as having competent authority, although in fact, he has, in the particular instance, exceed or violated his instructions, and acted without authority. For, in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract, by holding out the agent as competent to act and as enjoying his confidence.
>
> Persons dealing with an agent have the right to act upon the presumption that he is authorized to do and perform all things within the usual scope of his principal's business."

In the matter at hand, the court failed to follow the above precedent in rendering its decision. The court, in denying Carter Lumber's Motion for Summary Disposition and granting Echelon Homes' Motion for Summary Disposition, stated:

> "Now the issue of account stated - - you know, by the way, I don't think anybody at Echelon, I don't think that the folks at Echelon and the folks at Carter Lumber came out smelling like roses in this. Echelon - - the Echelon owners relied clearly inappropriately on is it Carmella or Connie Wood, Carmella or Connie Wood in terms of their day to day activities; and I don't know whether this mitigates in favor of or against going on vacation.
>
> Sometimes you would rather not know what's going on and if somebody's absence is going to make you find out, maybe that's not the best thing to do because it surely uncovered what can colloquially be described as a bag of worms, but the bottom line is **Echelon didn't have appropriate control in its shop of what jobs it had signed up for, where material was to go, how much, et cetera, et cetera, et cetera; and that is how this woman and her cohorts, if there were cohorts, was able to sidetrack a lot of material to her own home.**
>
> On the other hand, Carter Lumber never checked beyond her and they did something that was clearly a bad business practice and that is extending credit to somebody from whom they had no authorization to extend credit to. This was an additional signer

> on the fraudulent credit that she had already gotten. You must understand the reason I'm pointing this out is that nobody really did it right on either side of this lawsuit and both companies have been victimized.
>
> The question is whether the summary judgment - - I think part of this falls on the accounts stated issue. I don't think even considering the additional testimony which you argue, Mr. Stoychoff, says this is not an account, but that's not an account stated. An account stated cannot be inferred from the response to the questions that were given at this hearing. I felt that when I read the part of the transcript that I did read and nothing that Mr. McMahon has read has caused me to change my mind, so there is no evidence of any express understanding between the principles at Carter Lumber and Echelon regarding the account and until the Echelon owners were on - - until Miss Wood went on vacation, Carter Lumber had no knowledge whatsoever of -- is she a bookkeeper or accountant?" (P. 13-15, July 10, 2002 Tr.) (Emphasis added.)

In reaching her decision, the court ignored all the unrebutted evidence that Carter Lumber presented to demonstrate that Carmella Wood was Echelon Homes' agent with apparent authority. As stated earlier, she was Echelon Homes' office manager. She opened the mail, she took all phone calls for Echelon Homes, she prepared all the checks for Mr. Strange and Mr. Hysen's signatures so that the bills would be paid.

Echelon Homes did not discover Ms. Wood's fraudulent scheme until she went on vacation. It was only when Mr. Hysen began performing the duties that he had delegated to Ms. Wood did he discover her fraudulent scheme.

As a result, Echelon must be held responsible for their lack of supervision of Ms. Wood. Echelon held her out to the public as its office manager in charge of the day to day operations of Echelon's office. If Echelon would have reviewed Ms. Wood's work, then it would have discovered her fraudulent scheme.

Therefore, the Court of Appeals erred in affirming the Trial Court's Order granting Echelon's Motion for Summary Disposition and dismissing Carter's Counterclaim and denying Carter's Motion for Summary Disposition entering a Judgment in the amount of $26,987.82.

II. ECHELON HOMES RATIFIED THE WRONGFUL CONDUCT OF ITS AGENT AND THEREFORE IS INDEBTED TO CARTER LUMBER IN THE AMOUNT OF $26,987.82.

The officers of Echelon, while testifying before the Livingston County Circuit Court at Carmella Woods' restitution hearing and at deposition, admitted that Echelon Homes had an outstanding balance to Carter Lumber for the above amount. Thus, the Court of Appeals erred in affirming the granting Echelon's Motion for Summary Disposition and denying Carter Lumber's Motion for Summary Disposition.

A principal's acceptance of the benefits of an agent's unauthorized acts generally ratifies such acts. The general rule is found at *Lomba v General Motors Corp.*, 303 Mich 556; 6 NW2d 890 (1992) in which the court stated:

> "It is a proposition of law too fundamental and too well established to require a citation of authorities that, if a party adopts even unauthorized acts of another, and has received and accepted benefits accruing therefrom, he thereby adopts and ratifies the instruments by which the results were obtained, and is estopped from denying that the agent was authorized to act."

This general rule applies where the principal receives and accepts the fruits of the transaction even though the agent had made misrepresentations without the knowledge of the principal. *Lane v Wood*, 259 Mich 266; 242 NW 909 (1932).

In the matter at hand, Echelon is both liable for the remaining balance due since its officers ratified her conduct at the restitution hearing. As seen from their testimony, they

admitted that they were indebted to Carter Lumber for Ms. Woods' purchase.

Also, the construction supplies purchased at Carter Lumber and recovered by the Michigan State Police from Ms. Woods' home were given to Echelon. Echelon, in turn, used these goods to pay down its own debts. (Exhibit 5)

Thus, the Court of Appeals erred in affirming the Trial Court's Order granting Echelon Homes' Motion for Summary Disposition and denying Carter Lumber's Motion for Summary Disposition to enter a judgment in its favor in the amount of $26,987.82.

III. THE TRIAL COURT ERRED IN GRANTING ECHELON HOMES' MOTION FOR SUMMARY DISPOSITION DISMISSING CARTER'S COUNTERCLAIM FOR ACCOUNT STATED SINCE A DISPUTED QUESTION OF AGENCY MUST BE LEFT TO THE JURY.

In the matter at hand, Carter Lumber filed a Counterclaim with the Trial Court for account stated so as to collect the balance owed resulting from Echelon's purchases. As part of its Complaint, it filed an Affidavit of Account pursuant to MCL 600.2145; MSA 25A.2145. Echelon did not file a counter affidavit as required by the above statute. MCL 600.2145; MSA 25A.2145 states in part:

> ". . . if the defendant in any action gives notice, with his answer of a counter claim founded upon an open account, or upon an account stated, and annexes to such answer and notice a copy of such account, and an affidavit made by himself or someone in his behalf, showing the amount or balance claimed by the defendant upon such account, and that such account or balance is justly owing and due to the defendant, or that he is justly entitled to have such account, or said balance thereof, set off against the claim made by said plaintiff, and serves a copy of said account and affidavit , with a copy of such answer and notice, upon the plaintiff or his attorney, such affidavit shall be deemed prima facie evidence of such counter claim, and of the plaintiff's liability thereon, unless plaintiff, or someone in his behalf, within ten (10) days after service in causes in the circuit court and

> before trial in other cases, makes an affidavit denying such account or some part thereof, and the plaintiff's indebtedness or liability thereon and serves a copy thereon upon the defendant or his attorney, and in case of a denial or part of such counterclaim, the defendant's affidavit shall be deemed to be prima facie evidence of such part of the counterclaim as is not denied by the plaintiff's affidavit . . ."

As a result, Carter's Verified Complaint for Account Stated created a prima facie case as a matter of law pursuant to the above statute and an issue of fact for the jury to determine.

Further, any disputed question of agency must be left to the jury since Echelon did not file a counter affidavit. The court in *Miskiewicz v Smolenski*, 249 Mich 63; 227 NW 789 (1929) held that:

> "When there is a disputed question of agency, if there is any testimony, either direct or inferential, tending to establish it, it becomes a question of fact for the jury to determine. Whether a given relationship is that of principal and agent, or anything else and the sufficiency of the evidence to show the existence of an agency, where reasonable minds differ, are questions of fact for the jury."

Likewise to be submitted to the jury are issues where there is conflicts in the evidence as to the scope of the agent's authority. *Pratt v Van Rensslaer*, 235 Mich 633; 209 NW 807 (1926).

In the matter at hand, as seen from the evidence presented to the Trial Court, not only did Ms. Woods act on Echelon's behalf as its agent cloaked in apparent authority, Echelon also ratified Ms. Woods' alleged unauthorized acts since they benefitted from the fruits of her illegal transaction when they recovered the property from the Michigan State Police. As a result, an issue of fact clearly exists. Thus, the Court of Appeals erred in affirming the Trial Court's Order granting Echelon's Motion for Summary Disposition dismissing Carter's Counterclaim.

IV. CARTER LUMBER DID NOT CONVERT ECHELON'S PROPERTY NOR AID AND ABET MRS. WOOD'S CONVERSION OF ECHELON'S PROPERTY.

Carter Lumber is an innocent party. Carter Lumber had no knowledge of Ms. Wood's criminal activity. As a result, the Trial Court did not error when it granted Carter Lumber's Motion for Summary Disposition pursuant to MCR 2.116(C)(10).

Conversion is any distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with, his rights therein. *Brennan v Edward D. Jones & Co*, 245 Mich App 156 (2001). Money is a subject of conversion only when it is cable of being identified, such as a specific coin. *Garras v Beklares*, 351 Mich 141; 23 NW2d 239 (1946). Also, checks are considered property of the designated payee and may be subject to a suit for conversion. *Trial Clinic, P.C. v Block*, 114 Mich App 700; 319 NW2d 639 (1982).

In the matter at hand, Ms. Wood, Echelon's former employee, stated that Carter did not participate in her scheme. **(Exhibit 8)** Further, Carter did not exercise any dominion or control over any of Echelon's personal property. The property that was taken was that of Carter's. Ms. Wood submitted a credit application with a forged signature of one of Echelon's principals upon it. Ms. Wood and her brother would then place an order for pick-up or delivery and purchase it with Echelon's credit account. Ms. Wood then used these supplies to remodel her home. Mr. Lobenstein used the supplies for remodeling his home and other construction projects he was involved in during this period.

As previously stated, Echelon employed Ms. Wood as its agent secretary, bookkeeper and office manager. Echelon placed her in this position to deal with the public. Some of Ms. Wood's duties were to open the mail, take all phone calls for Echelon and prepare all the checks

for signature for vendor payment. As a result, Echelon is bound by Ms. Wood's conduct since Echelon cloaked Ms. Wood with apparent authority to do acts that she was not authorized to perform.

The law concerning apparent authority is well established in Michigan. Apparent authority has been defined as:

> "Whenever a principal has placed an agent in such a situation that a person of ordinary prudence, conversant with business usages and the nature of the particular business, is justified in assuming that such agent is authorized to perform in behalf of the principal, the particular act, and such particular act has been performed, the principal is estopped from denying the agent's authority to perform it." *Maryland Casualty Company v Moon*, 231 Mich 56; 203 NW2d 885 (1925).

The vicarious liability of a principal for an agent's intentional tort includes liability for fraud and other non-physical torts. *1 Restatement Agency 2d,* §219(2)(d), states the master is liable even if the servant is acting outside the scope of employment if the servant purports to act or to speak on behalf of the principal and there was reliance upon apparent authority or if he was aided in accompanying the tort by the existence of the agency relationship. A principal who puts a servant or other agent in a position which enables an agent while apparently acting within his authority to commit fraud is subject to liability to such third person for fraud. *1 Restatement Agency 2d,* §201.

In *Central Wholesale Co. v Sefa*, 351 Mich 17; 87 NW2d 94 (1957), the court cited *Story on Agency* (9th Ed.) Sec. 443 which states:

> "But the responsibility of the principal to third persons is not confined to cases where the contract has been actually made under his expressed or implied authority. It extends further, and binds the principal in all cases where the agent is acting within

> the scope of his usual employment, or has held out to the public or to the other party, as having competent authority, although in fact, he has, in the particular instance, exceed or violated his instructions, and acted without authority. **For, in all such cases, where one of two innocent persons is to suffer, he ought to suffer who misled the other into the contract, by holding out the agent as competent to act and as enjoying his confidence.**
>
> Persons dealing with an agent have the right to act upon the presumption that he is authorized to do and perform all things within the usual scope of his principal's business." (Emphasis added.)

In this matter, Echelon Homes did not discover Ms. Wood's fraudulent scheme until she went on vacation. It was only when Mr. Hysen began performing the duties that he had delegated to Ms. Wood did he discover her fraudulent scheme.

As a result, Echelon must be held responsible for their lack of supervision of Ms. Wood, not Carter. Echelon held her out to the public as its office manager in charge of the day to day operations of Echelon's office. If Echelon would have reviewed Ms. Wood's work, then it would have discovered her fraudulent scheme long ago.

Thus, the Court of Appeals erred in reversing the Trial Court's Order granting Carter's Motion for Summary Disposition.

V. CARTER LUMBER DID NOT COMMIT FRAUD.

Carmella Wood testified that Carter had no knowledge of her fraudulent scheme. She stated that she lied to Carter so as to enable her to purchase the construction supplies.

The traditional common law claim of fraudulent misrepresentation requires the Plaintiff to show the following: 1) the Defendant made a material representation; 2) the representation was false; 3) the Defendant knew it was false when it was made or made it recklessly without

knowledge of its truth and as a positive assertion; 4) the representation was made with the intention to induce reliance by the Plaintiff; 5) the Plaintiff acted in reliance upon it; and 6) the Plaintiff suffered injury. *Temborious v Slayten*, 157 Mich App 387; 403 NW2d 821 (1986).

Michigan law requires a claim of fraud to be proved by clear, satisfactory and convincing evidence. *Hi-Way Motor Company v International Harvester Company*, 398 Mich 33; 247 NW2d 813 (1976).

In the matter at hand, Carter was an innocent party and, unfortunately, just as much a victim as Echelon. Ms. Wood testified:

Q. So, Seth had no knowledge of what you were doing?

A. None whatsoever.

Q. Did any employee at Carter Lumber have any knowledge of what was going on?

A. Not to my knowledge. I didn't - - -

Q. Did you give kickbacks to anybody?

A. Nothing . . . **(Exhibit 8)**

Thus, Carter did not make any material representations which it knew to be false and on which Echelon relied on to its detriment. As a result, the Court of Appeals erred in reversing the Trial Court's Order granting Carter's Motion for Summary Disposition.

VI. CARTER LUMBER IS NOT LIABLE FOR AIDING AND ABETTING WOOD'S BREACHES OF FIDUCIARY DUTY.

The cause of aiding and abetting breach of fiduciary duties does not exist in Michigan. Further, the allegations in Echelon's Complaint fail treated as civil conspiracy. The elements for civil conspiracy in Michigan are: 1) concerted action; 2) by a combination of two or more

persons; 3) to accomplish an unlawful purpose or a lawful purpose by criminal or unlawful means; and 4) causing damage to the Plaintiff. *Mays v Three Rivers Rubber Corp.*, 135 Mich App 42; 352 NW2d 339 (1984).

As seen from the above Statement of Facts, Carter did not aid and abet Ms. Wood in breaching her fiduciary duties and there as no concerted action between Carmella Wood and Carter to accomplish an unlawful purpose. Ms. Wood admitted that she had lied to Carter by submitting a forged credit application. At her deposition, Ms. Wood testified:

Q. Now, there was a credit application that was filled out to Carter Lumber?

A. Yes.

Q. Who did that?

A. I did.

Q. Whose name did you sign to that?

A. I believe its Jim's.

Q. Did they ask you to open an account with Carter Lumber?

A. I did a lot of accounts for them and they would sign them. This particular time, they weren't in the office, so I signed their name.

Q. But did they ask you to open up an account with Carter Lumber?

A. I told them that I was opening this account up because it was close to their subdivision over there by the proving grounds, but it never got used.

I did advise Jim and Kevin Cover, the foreman, that I had opened that up for them to use. They never used it and never went that far. I used it for my own personal use. **(Exhibit 8)**

Ms. Wood also admitted that she lied to Carter's employees in order that they would execute the Waivers of Liens. Ms. Wood stated at her deposition:

Q. Okay. And those were the liens that - - the waivers that you had Seth sign, correct?

A. Correct.

Q. Now, explain to me how - - why how did you get Seth to sign those liens?

A. What it is, is the title company required a lien waiver stating either its paid in full or payment to be paid directly to the subcontractor or the vendor or supplier or whatever. And I needed him to give me one that I could get a check cut to him to Carter Lumber for a partial payment, which I did, and I took it down there to have him sign.

Q. Okay.

A. On my house.

Q. On your house?

A. Yes.

Q. Okay, but did he just sign it?

A. Yes.

Q. And you just stuck it in front of his face?

A. Yes.

Q. Did you explain to him that this is - -

A. Yes. I told him I needed it to get payment from the title company for that job. He thought it was, quote-unquote, a job.

Q. Oh. So it was his mistaken impression that he was signing off on a job, a legitimate job for Echelon Homes?

A. Yes, exactly.

Q. Okay. And there was two other waivers that were signed, I think?

A. Exact same thing.

Q. So- -

A. He was under the impression that it was a legitimate job for Echelon Homes.

Q. So you misrepresented to Seth what, in fact, was going on.

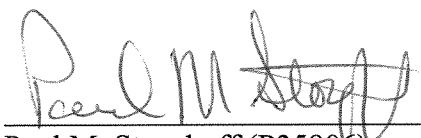
A. Right, I lied to him. **(Exhibit 8)**

As a result, the Trial court did not err in granting Carter Lumber's Motion for Summary Disposition and the Court of Appeals erred in reversing the Trial Court's Order granting Summary Disposition and dismissing Echelon's Complaint..

RELIEF REQUESTED

Wherefore, Carter Lumber Company requests Carter Lumber Company's Application for Leave to Appeal be granted.

Respectfully submitted,



Paul M. Stoychoff (P35906)
Attorney for Defendant/Appellant

Dated: April 20, 2004

STATE OF MICHIGAN

IN THE SUPREME COURT

Docket Nos. 125994 & 125995

ECHELON HOMES, LLC,
Plaintiff/Counter-Defendant/Appellee,

Court of Appeals No. 243112

v.

Trial Court No. 01-029345-CZ
Oakland County Circuit Court
Judge Eugene Schnelz

CARTER LUMBER COMPANY,
Defendant/Counter-Plaintiff/Appellant,

and

ECHELON HOMES, LLC,
Plaintiff/Counter-Defendant,

Court of Appeals No. 243180

v.

Trial Court No. 01-029345-CZ
Oakland County Circuit Court
Judge Eugene Schnelz

CARTER LUMBER COMPANY,
Defendant/Counter-Plaintiff.

125994-5

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PLAINTIFF ECHELON HOMES' BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL

PROOF OF SERVICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

COUNTER-STATEMENT OF ORDER APPEALED FROM AND RELIEF SOUGHT

Carter Lumber does not provide a Statement of Order Appealed From and Relief Sought as required by MCR 7.302(A)(1)(a). Therefore, Echelon Homes cannot comment on this requirement for an application for leave to appeal.

COUNTER-STATEMENT OF QUESTIONS INVOLVED

1. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that the Circuit Court properly granted summary disposition on Carter Lumber's "account stated" claim where Carter Lumber presented no evidence of an agreement between Echelon and itself?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

2. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that the Circuit Court properly granted summary disposition on Carter Lumber's claim that Echelon could not be held liable for the unauthorized actions of its employee as an apparent agent where the only evidence of the agency was created by the employee (e.g., Echelon did not hold the employee out as being authorized to act in the manner upon which Carter Lumber allegedly relied)?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

3. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that the Circuit Court properly granted summary disposition on Carter Lumber's "account stated" claim where Carter Lumber presented no evidence to support a claim that Echelon "ratified" the illegal acts of its employee?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

4. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that the Circuit Court properly granted summary disposition on Carter Lumber's claim of "actual" authority where the only evidence of such actual authority was the affidavit of Carter Lumber's counsel claiming an account stated existed?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

5. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that Echelon had presented sufficient evidence to assert a statutory claim for Carter Lumber's aiding and abetting an employee who admittedly stole, embezzled or converted Echelon's property?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

6. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that Echelon had presented sufficient evidence to assert a fraud claim against Carter Lumber where Carter Lumber was alleged to have, at a minimum, recklessly and admittedly signed construction lien waivers to secure payments from Echelon's title company under circumstances where Carter Lumber had no knowledge of ever having delivered goods to the properties for which it was executing lien waivers?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

7. Whether leave to appeal should be denied where the Court of Appeals did not extend or modify existing Michigan law when it held that Echelon had presented sufficient evidence to assert a claim for aiding and abetting breach of fiduciary duty where Carter Lumber knew that Echelon's employee owed it fiduciary duties and where Carter Lumber assisted the employee in defrauding Echelon?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

COUNTER-STATEMENT OF PROCEEDINGS AND FACTS

As an initial matter, the statement of facts provided by Carter Lumber fails to meet the requirements of MCR 7.212(C)(6) as Carter Lumber engages in an open dialogue on issues without citation to the record below. Echelon requests that the Court strike all Carter Lumbers statements not supported by a citation to the record below.

I. Carmela Wood

Carmela Wood ("Wood") was employed by Plaintiff/Appellant Echelon Homes "Echelon" as a secretary, administrative assistant and bookkeeper in April 1997. Hysen Affidavit, ¶ 3, attached as App. Exh. 1.[1] In that capacity, Wood was placed in a position of trust and had access to Echelon's financial books and records, and, more importantly, to Echelon's check book. Hysen Affidavit ¶ 3. Her duties Included tracking bills and expenses and preparing checks for payment of these bills and expenses. Hysen Affidavit, ¶ 3; *see* Echelon Complaint, ¶¶ 6-7, App. Exh. 2.

II. The Fraudulent Scheme Is Discovered

On July, 7, 2000, Echelon discovered that Carmela Wood had been engaged in a scheme to embezzle funds from Echelon and convert those funds to her own uses. Echelon discovered the fraud when its owners opened the mail while Wood was on vacation. Hysen Affidavit, ¶ 4.

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[1] All exhibits referenced were submitted to the Michigan Court of Appeals and, before that, the Circuit Court.

While she was at work, Wood ordinarily opened all mail. When she was on vacation, Echelon's owners opened the mail. In doing so, they discovered invoices from purported Echelon creditors from whom Echelon had never purchased goods or services. This discovery caused Echelon to investigate Wood's activities, and, as a result of the investigation, Echelon discovered that Wood had engaged in a fraudulent scheme to embezzle monies from Echelon by forging checks, making fraudulent statements, and falsifying other documents (the "Fraudulent Scheme"). Hysen Affidavit, ¶ 4.

Echelon immediately reported the Fraudulent Scheme to the Michigan State Police on the evening of July 7. Hysen Affidavit, ¶ 5.

Wood returned from vacation on Monday, July 10, and when she reported to work, Echelon immediately terminated her employment. Hysen Affidavit, ¶ 6. Wood was arrested by the State Police at that time. Hysen Affidavit, ¶ 7. She eventually pled guilty and was sentenced as a result of her theft from Echelon. *See* Complaint, App. Exh. 2, ¶ 8.

III. The Fraudulent Conduct

The Fraudulent Scheme Included a variety of improper and unlawful acts which Wood, aided and abetted by the others, used to convert or embezzle Echelon's assets.

For example, Wood forged the signatures of Echelon's owners on checks made payable to herself. (Examples of such checks are attached as Exhibit A to the Hysen Affidavit, App. Exh. 1, A .) Hysen Affidavit, ¶ 10(a). Wood also fraudulently

obtained credit accounts with various vendors in Echelon's name by forging signatures on applications and by holding herself out to be authorized to sign contracts on behalf of Echelon, despite the fact that she was not so authorized. (An example of a forged application is attached as Exhibit B to the Affidavit.) Hysen Affidavit, ¶ 10(b). Further, Wood charged supplies and materials on both Echelon's existing accounts and accounts fraudulently opened by herself. (Example of invoices from Carter Lumber are attached as Exhibit G to the Hysen Affidavit, App. Exh. 1, G.) Hysen Affidavit, ¶ 10(b).

Wood converted and used Echelon's materials, money, credit and assets for her own use and benefit as well as the use and benefit of others. Hysen Affidavit, ¶¶ 10-15.

To conceal the Fraudulent Scheme, Wood set up a post office box in Highland, Michigan in the name of Echelon without the knowledge of Echelon's principals to hide billings and statements for fraudulent accounts and unauthorized purchases. Hysen Affidavit, ¶ 10(e).

IV. Carter Lumber Is Deeply Involved In The Fraudulent Scheme And Reaps Substantial Benefits From Wood's Fraud

A. Carter Lumber Needs To Generate Business

Over the last few years, Carter Lumber, particularly its White Lake store, was faced with substantial competition. As a result of this competition, Carter Lumber sought to focus more of it business development activities on the contractor market. Rinks Deposition, pp. 16-17 attached as App. Exh. 3. The White Lake

store manager, Seth Rinks, made himself familiar with the local homebuilders to better understand his target market. Rinks Dep., p. 17.

B. Carter Lumber Accepts And Approves An Application For Credit From An Unknown Builder's Employee Without Ever Contacting The Owners Of The Building Company

In March 1999, Carmela Wood submitted an application for credit purportedly on behalf of Echelon Homes, a Brighton homebuilder. Without contacting the alleged signers of this application, Carter Lumber approved the application. *See* Complaint, App. Exh. 2, ¶ 11 and Application, App. Exh. 4.

This application was approved even though the store manager never heard of Echelon Homes (although he was familiar with the contractors in his area) and even though the manager admitted Brighton, where Echelon is located, is not in the vicinity of his White Lake store. Rinks Dep., App. Exh. 3, pp. 40-41.

C. Carter Lumber Violates The Terms Of The Phony Application And Allows The Family And Friends Of Wood To Charge On The Fraudulent Account

After opening the facially suspicious charge account without bothering to ask the owners if they approved the account, Cater Lumber began a program and practice of violating the terms of the charge account. Specifically, the account provided that only certain authorized users could charge on the account. Application, App. Exh. 4. Carter Lumber ignored this provision in its own account application.

Carter Lumber did not even require Wood to appear at the store to obtain goods. Instead, her brother, Ronald Lobenstein, appeared at Carter Lumber and

charged goods to the "Echelon" account. *See* Complaint, App. Exh. 2, ¶ 19; Rinks Dep., p. 60.

Carter Lumber made no effort to confirm through Echelon's owners that Ron Lobenstein was entitled to use the account except to speak with Wood. Rinks Dep., p. 60, App. Exh. 3.

Even the fraudulent application specified who could use the account. If a new user was to be authorized, it stands to reason that only the owners of Echelon could add the additional names. *See* Application, App. Exh. 4. In fact, the application states that Carter Lumber is to call Echelon to verify all other persons using the account. Since only the owners could authorize new users, Carter Lumber could only rely upon a conversation with the owners to add new users.

Incredibly, Carter Lumber allowed Lobenstein to purchase goods on the Echelon account and have the materials delivered to Lobenstein's personal home in Pontiac. Indeed, the store manager admits he was at this home on at least one occasion. Rinks Dep., App. Exh. 3, pp. 42-44.

Not only did Carter Lumber allow Ron Lobenstein to pick-up merchandise from its store on the Echelon account, Carter Lumber also allowed Randy Lobenstein, Ron and Connie's brother, to pick-up materials on the account. Randy Lobenstein Dep., App. Exh. 5, p. 29. When Randy Lobenstein appeared at the store, Carter Lumber gave him the materials without asking for ID even though Randy Lobenstein could not even provide the correct address for Echelon when asked by the Carter Lumber employee. Randy Lobenstein Dep., App. Exh. 5, p. 30.

Undaunted by Randy Lobenstein's lack of information, Carter Lumber loaded the materials into his truck. Randy Lobenstein Dep., App. Exh. 5, p. 31.

Carter Lumber even allowed Paul Lobenstein to obtain goods on the fraudulent Echelon account. App. Exh. 6, Invoice signed by Paul Lobenstein.

D. Without Contacting The Owners Of Echelon Homes, Carter Lumber Allows An Echelon Employee To Change The Billing Address For Echelon Homes – Which Is Known To Carter Lumber To Be A Brighton Builder With Brighton Offices And A Brighton Phone Number – To A Highland P.O. Box

Adding to Carter Lumber's failures, Carter Lumber, which knew Echelon was a Brighton company based upon its application, inexplicably changed the mailing address for Echelon to a P.O. Box in Highland. This P.O. Box was controlled by Wood and allowed her to conceal Carter Lumber's billings. Hysen Aff., App. Exh. 1, ¶10(e); App. Exh. 7, Invoice from Carter Lumber with false address.

E. Carter Lumber Signs Knowingly False Lien Waivers To Obtain Checks From Legitimate Echelon Homes Construction Accounts

Carter Lumber also assisted Wood in converting funds from legitimate Echelon construction accounts. For example, Carter Lumber accepted a May 1, 2000 check from American Title, which check should have gone to pay legitimate suppliers, that clearly stated it was for work done at 3875 Honor's Way. Carter Lumber cannot produce any evidence that it ever delivered materials to this legitimate Echelon project. Yet, it accepted the check from Wood without question. Rinks Dep., App. Exh. 3, pp. 89-90; Checks, App. Exh. 8. In fact, Carter Lumber accepted two other checks from American Title with particular project designations,

even though Cater Lumber never delivered goods to these jobs. Rinks Dep., App. Exh. 3, pp. 91-92.

It gets even worse. Carter Lumber's manager, Seth Rinks, signed a lien waiver for one of Echelon's legitimate projects representing that Carter Lumber had provided goods to the site and was entitled to payment. However, Carter lumber admits it has no knowledge as to whether its goods were ever used at the location for which it was signing the waiver. Rinks Dep., App. Exh. 3, pp. 92-93 and False Lien Waivers, App. Exh. 9.

As a result of Carter Lumber's actions, "Echelon" became one of the largest credit customers of Carter Lumber's White Lake store even though Carter Lumber never once talked with Echelon's owners.[2] Rinks Dep., App. Exh. 3, pp. 79-80.

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[2] On May 12, 2000, Carter Lumber Increased Echelon's credit line by another $10,000 to $35,000 without consulting with Echelon's owners. Rinks Dep., App. Exh. 3, pp. 80-81.

ARGUMENT

I. Introduction

Carter Lumber seeks leave to appeal the Court of Appeals March 30, 2004 Opinion in this matter. This request is based entirely upon Carter Lumber's assertions that the facts presented by Echelon cannot, as a matter of law, support the stated claims. That is, Carter Lumber does not suggest that the Court of Appeals misstated Michigan law and that this misstatement will have an impact to Michigan jurisprudence. Rather, Carter Lumber asserts that the admittedly correct legal standards were improperly applied to the facts of this particular case. This Court, consistent with MCR 7.302, should not be inclined to grant leave in cases where a party merely claims evidence, which has yet to be presented to a jury, should never be presented to a jury because it is allegedly insufficient to support a claim. If such cases met the standard for leave, this Court would have to grant leave in virtually every matter.

Notwithstanding Carter Lumber's inability to meet the requirements for leave, reviewing the facts of this case, the Court of Appeals committed no error. Echelon has asserted claims against Carter Lumber for aiding and abetting conversion pursuant to MCL 600.2919a, fraud and aiding and abetting breach of fiduciary duty. These claims are based, in part, upon the following extraordinary misconduct of Carter Lumber such as:

- Signing a lien waiver for a construction project for which Carter Lumber knew it never provided materials (False Lien Waiver, App. Exh. 9);
- Never contacting Echelon's owners when it was asked by the employee to sign the false lien waiver (Rinks Dep., App. Exh. 3, pp. 79-80);
- Accepting a check cut by the title company as a result of the false lien waiver (Checks, App. Exh. 8 and Rinks Dep., App. Exh. 3, pp. 91-92);
- Accepting a check based upon the lien waiver for an amount which surpassed the amount of any single delivery Carter Lumber made;
- Accepting checks from a title company that clearly stated what jobs those checks were for even though Carter Lumber knew it did not delivered goods to those projects (Checks, App. Exh. 8);
- Never contacting the owners when the employee sought credit line Increases (Rinks Dep., App. Exh. 3, pp. 80-81);
- Never contacting the owners when the employee sought to add additional "authorized" users (Rinks Dep., App. Exh. 3, p. 60);[3]
- Sending Carter Lumber invoices to a PO Box in Highland at the request of the employee when Echelon, as stated on its "application," is located in Brighton and Carter Lumber contacted the employee by calling Echelon's Brighton office

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[3] How does an authorized user on another person's account gain the authority to add additional authorized users?

(Invoiced with false address, App. Exh. 7 and Application, App. Exh. 4);

- Never contacting Echelon's owners where the store manager admits Echelon was outside the area of businesses that would typically use his White Lake store (Rinks Dep., App. Exh. 3, pp. 40-41 and 80-81);
- Delivering substantial goods to the employee's brothers' homes (Rinks Dep., App. Exh. 3, pp. 42-44); and
- Allowing unauthorized users to pick-up goods on the account (Lobenstein Dep., App. Exh. 5, pp., 29-31 and Receipt, App. Exh. 6).

This evidence demonstrates, at a minimum, a question of fact exists as to Carter Lumber's participation or assistance to the Fraudulent Scheme.

In response to Echelon's claim, Carter Lumber asserts that Echelon is liable to it for unpaid amounts on the fraudulent credit account established by the employee. Incredibly, Carter Lumber asserts that the employee was vested with the apparent authority to establish the fraudulent account or that Echelon, after discovering the fraud, ratified the false account by testifying at a restitution hearing about the amounts the employee embezzled. Carter Lumber asserts that it presented sufficient evidence on these issues to have the claims proceed to trial. Carter Lumber, as held by the Court of Appeals, is wrong.

In sum, this Court should not grant leave to review what amounts to nothing more than the application of law to fact where the sole issue is whether sufficient evidence has been presented to avoid, or grant, summary disposition.

II. Carter Lumber Fails To Meet The Standard For The Grant Of Leave To Appeal

This is a civil case between two private entities. The Michigan Court Rules provide for leave to appeal to the Michigan Supreme Court to be granted in such a case in only one circumstance. Carter Lumber must show that "the issue involves legal principles of major significance to the state's jurisprudence." MCR 7.302(B)(3). Carter Lumber fails to meet this standard.

As the discussion below will highlight, Carter Lumber's application for leave makes two critical errors. First, Carter Lumber continues to argue that statements made by the Circuit Court were wrong and misapplied the law. These Circuit Court statements, however, are not precedential and have been superceded by the analysis of the Michigan Court of Appeals. Thus, why the Circuit Court ruled as it did is of no relevance to the present application.

Second, Carter Lumber does not claim that the Court of Appeals Incorrectly stated or changed existing Michigan precedent.[4] Instead, Carter Lumber essentially challenges the application of Michigan law to the specific facts of this case. The limited nature of this challenge does not implicate principles of major

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[4] Indeed, there is not a single instance in Carter Lumber's Application for Leave where it attempts to distinguish a case relied upon by the Court of Appeals.

significance to Michigan jurisprudence as a whole because Carter Lumber's is a fact specific challenge. In other words, Carter Lumber just wants this Court to engage in a *de novo* review of the Court of Appeals' holding, which correctly stated the law, based upon a factual analysis of this case.

In sum, Carter Lumber cannot meet the standard for granting leave.

III. There Is No "Account Stated" Between Echelon And Carter Lumber

As it did in the Court of Appeals, Carter Lumber launches into a discussion of agency relationships without first providing the background of what must be established to prove its underlying claim: "account stated." In light of this deficiency, Echelon provides a summary of the law for the Court.

An "account stated" results from the conversion of an "open account" to an account in which both parties agree as to amount:

> The conversion of an open account into an account stated, is an operation by which the parties assent to a sum as the correct balance due from one to the other; and whether this operation has been performed or not, in any instance, must depend upon the facts. That it has taken place, may appear by evidence of an express understanding, or of words and acts, and the necessary and proper inferences from them. When accomplished, it does not necessarily exclude all inquiry into the rectitude of the account. White v. Campbell, 25 Mich. 463, 468. [Kauntiz v. Wheeler, 344 Mich. 181, 185, 73 N.W.2d 263 (1955)]

It is a "balance struck between the parties on a settlement." Keywell & Rosenfeld v. Bithell, 254 Mich. App. 300, 331, 657 N.W.2d 759 (2002).

In Larsen v. Stiller, 344 Mich. 279, 288, 73 N.W.2d 865 (1955), this Court held that the trial court properly instructed the jury, in part:

> Now, the mere rendering of an account is not an account stated. An account stated must be an arrangement consented to either by acts of the parties or otherwise. It must be a contractual relationship existing between the parties. A statement is not at law an account stated unless both parties have agreed, by a contract arrangement or by their own actions, that it is correct.

Here, there has been no agreement as to the debt owed. Carter Lumber has asserted via the affidavit of its attorney that the books of Carter Lumber reflect an obligation of Echelon Homes. As demonstrated by Echelon's lawsuit against Carter Lumber, which was filed prior to the claim for an account stated, Echelon vehemently disagrees that it owes any money to Carter Lumber, and, in fact, Echelon argues that it is entitled to a judgment against Carter Lumber.

There is no writing executed by Echelon reflecting any obligation of Echelon and there has been no meeting of the minds on the issue of the debt. Thus, Carter Lumber has no claim for an account stated.

The affidavit of Carter Lumber's counsel may be *prima facie* evidence of a claim but this evidence was rebutted by the submissions of Echelon.[5] Moreover, prior to filing its claim, Carter Lumber was in possession of Echelon's lawsuit, which clearly established Echelon's contention that it did not, in fact, owe any amounts to Carter Lumber.

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[5] Carter Lumber suggests that the affidavit requires a jury trial. Why? If Carter Lumber has no evidence to support the bald assertions in the affidavit why is a court required to go through the futile act of a trial? Is a jury really going to believe that the affidavit of Carter Lumber's attorney proves anything? Can a jury really be allowed to find an account stated based upon the bald assertions of the attorney where no evidence exists to support the elements of a claim for an account stated?

Thus, Carter Lumber's affidavit was meaningless when filed and could not have been based upon any fact in good faith.

IV. Carter Lumber Cannot Claim That Wood Was Vested With "Apparent Authority" To Act On Echelon's Behalf

Carter Lumber has asserted that Echelon is responsible for Wood's actions in her capacity as agent because of Wood's "apparent" authority. Carter Lumber is wrong for two reasons. First, Carter Lumber's claim for an "account stated" is a question of consent and not agency. *See* Larsen, 344 Mich. at 288.

Second, even if agency were a factor, there is no competent evidence for a reasonable juror to conclude that Echelon vested Wood with the apparent authority to: (a) change the billing address of the business from Brighton to Highland even though Echelon continued to use a Brighton phone number; (b) authorize delivery of thousands of dollars of goods directly to her home;[6] (c) authorize her brother to purchase goods on Echelon's account and have thousands of dollars of goods delivered to his home; and (d) authorize Wood to have false lien waivers executed by Carter Lumber.

Carter Lumber's Application for Leave proves the validity of the Circuit Court's dismissal of its claim. Specifically, Carter Lumber offers no evidence from the record that would support a finding that Echelon Homes held Wood out to

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[6] This act is particularly troubling considering that Carter Lumber's own credit application expressly forbids the use of the account for "personal, family or household use." App. Exh. 4.

Carter Lumber as someone authorized to purchase building materials or open accounts in the name of Echelon Homes.

The Restatement states that "apparent authority" is: "the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons." *Restatement Agency*, 2d, § 8, p 30. Further,

> Apparent authority arises where the acts and appearances lead a third person ***reasonably to believe*** that an agency relationship exists. [Alar v. Mercy Memorial Hospital, 208 Mich. App 518, 528; 529 N.W.2d 318 (1995)]

See also Meretta v. Peach, 195 Mich. App. 695, 698, 491 N.W.2d 278 (1992). However, "apparent authority must be traceable to the principal and cannot established by the acts and conduct of the agent." Id.

Carter Lumber argues it was entitled to rely upon the representations of Wood because she was Echelon's office manager, she opened the mail, she took Echelon's phone calls and she prepared the checks to pay Echelon's bills. However, none of these "duties" was a manifestation of authority communicated from Echelon to Carter Lumber with any intent that Carter Lumber rely upon such "duties" as evidence of Wood's authority. Nor was it "reasonable" for Carter Lumber to rely upon these duties to conclude Wood had the authority to order building materials and have them delivered to her home and her brother's home.[7]

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[7] Curiously, Carter Lumber offered no testimony to the Circuit Court, the Court of Appeals or this Court establishing that Carter Lumber did, in fact, believe

Under Carter Lumber's theory, every small business in the State of Michigan must fear a ruling from this Court that having a one person office creates "apparent" authority for the employee to open a credit line and personally charge hundreds of thousands of dollars of goods.[8]

Carter Lumber's claim that Wood had "apparent" authority is even more Incredible when the Court considers Carter Lumber never tried to talk with Mr. Hysen or Mr. Strange about (i) credit approvals, (ii) credit Increases, (iii) the addition of authorized users, (iv) requests to sign false lien waivers or (v) substantial deliveries of goods purchased on Echelon's account to the homes of Wood and her brother.

All Carter Lumber has is the statements of Wood herself. However, it is well established that the representations of a purported agent cannot establish the agent's actual or apparent authority: "In the case at bar, defendants only point to alleged representations by Logan [the agent] to establish the apparent authority. Accordingly, their argument must fail since Logan's representations, if any, cannot be the basis for establishing his own authority." Potomac Leasing Co. v. The French Connection Shops, Inc., 172 Mich. App. 108, 114, 431 N.W.2d 214 (1988).

Wood had the "apparent authority" to act. Instead, Carter Lumber creates an argument with no evidence that "reasonably" or otherwise it believed Wood was acting on behalf of Echelon.

[8] Imagine the liability that would be created for every small business by the mere fact that leaving an assistant alone in an office automatically vests the assistant with the apparent authority to bind the business owner with respect to all

Indeed, other than her "duties" of answering phones, opening mail and paying bills, Carter Lumber can point to no evidence that the owners of Echelon in any way suggested to the world that Wood was entitled to open charge accounts in the name of the business and was entitled to have those goods delivered to her home. *See* Cutler v. Grinnell Bros., 325 Mich. 370, 378, 38 N.W.2d 893 (1949) (finding store manager did not have apparent authority to contract for construction work).

Carter Lumber's arguments also fail as a matter of contract. Carter Lumber's own documents prove that it could not rely upon Wood's "apparent" authority as the credit application was purportedly signed by Echelon's owners[9] and required their consent to make changes to the credit status. App. Exh. 4, Application. Despite this, Carter Lumber ***NEVER SPOKE WITH ECHELON'S OWNERS*** when Wood (i) had goods delivered to her home; (ii) had credit lines Increased; and (iii) had the address for where invoices were sent changed.

Thus, assuming a binding contract existed for purposes of this argument only, Carter Lumber was the first to breach any alleged agreement with Echelon when it engaged in such reckless conduct: "The rule in Michigan is that one who

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credit accounts opened by the assistant, without the owner's approval, while the owner was out of the office.

9 By requiring the signatures of Mr. Hysen and Mr. Strange, although forged, on the application, Carter Lumber expressly recognized that Wood did not have the authority to bind Echelon. Indeed, Carter Lumber's application states: "Signatories must be a proprietor, general partner or an officer of the company . . . ." App. Exh. 4. Wood was none of these things.

first breaches a contract cannot maintain an action against the other contracting party for his subsequent breach or failure to perform." Michaels v. Amway Corp., 206 Mich. App. 644, 650, 522 N.W.2d 703 (1994), *quoting* Flamm v. Scherer, 40 Mich. App. 1, 8-9, 198 N.W.2d 702 (1972). When Carter Lumber engaged in these acts, it did so at its own peril and cannot seek relief from Echelon.

In sum, Carter Lumber provides no evidence that the "apparent authority" given to Wood to manage Echelon's office also Included the authority to order ***building*** materials for Echelon or that office managers routinely order building materials in the home building industry or that office managers normally have thousands of dollars of materials delivered to their personal home or that a reasonably prudent business would accept the representations of an office manager on each of these issues.

Carter Lumber simply provides no evidence that Echelon is responsible for Wood's fraud as the conduct exceeded her authority.

V. Carter Lumber's Statements That Echelon "Ratified" A Debt To Carter Lumber Is "Absurd" And Borders Upon Bad Faith

Echelon lost over $500,000 as a result of Wood's unlawful conduct. Yet, Carter Lumber claims that Echelon "ratified" this theft.

In David v. Serges, 373 Mich. 442, 443-44, 129 N.W.2d 882 (1964),[10] this Court adopted the definition of ratification from *Restatement of Agency*, 2d, §§ 82 and 83 (which the Court of Appeals relied upon in this case):

> Ratification is the affirmance by a person of a prior act which did not bind him but which was done or professedly done on his account, whereby the act, as to some or all persons, is given effect as if originally authorized by him.
>
> and
>
> Affirmance is either
>
> (a) a manifestation of an election by one on whose account an unauthorized act has been done to treat the act as authorized, or
>
> (b) conduct by him justifiable only if there were such an election.

Here, Carter Lumber Incredibly claims that because Echelon assisted the Livingston County prosecutor in pursuing its employee criminally, it "ratified" her criminal conduct. This is absurd.

As part of the criminal proceedings against Wood, the Livingston County prosecutor, William McCririe, asked Echelon to compile information concerning the amounts Wood stole from ***all*** known parties. Indeed, the transcript of the hearing proves this point:

> Q (by Mr. McCririe): As a result of the information that you got in preparing for today's hearing were you able to determine whether or not Echelon Homes and the two principals of Echelon Homes

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10 Carter Lumber relies upon Lomba v. General Motors Corp., 303 Mich. 556, 6 N.W.2d 890 (1942). However, Carter Lumber Incorrectly cites this case as being from 1992 and not 1942. David, not Lomba is the more recent precedent.

and some other people lost money as a result of some conduct of Ms. Wood?

A: Yes. [App. Exh. 10, p. 6-7 (emphasis added).]

At the restitution hearing for Wood, Echelon correctly stated that Carter Lumber is still looking to Echelon for the balance of the charges made by Wood. Indeed, Echelon's employee testified that she obtained the information regarding the claimed debt directly from Carter Lumber. *See* Exhibit 11, p. 34.

In short, Echelon, at the request of the Livingston County prosecutor as the main victim of the theft, was simply identifying the scope of Wood's theft.[11]

The deposition testimony of James Hysen also provides no support to Carter Lumber:

Q: Echelon Homes. I'm sorry – that Echelon Homes has outstanding to Carter Lumber is $26,987.82.

A: ***According to Carter Lumber's paperwork***, apparently, yes, that is the outstanding balance. [App. Exh. 10, p. 8, (emphasis added).]

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[11] The Court should note that MCL 780.766, upon which Carter Lumber has previously relied, expressly recognizes that a "threatened" "financial" "harm" makes Echelon a victim for purposes of restitution. Here, the "threatened" financial harm exists with Carter Lumber. This statute, however, does not make Echelon responsible for the "threatened" harm.

First, this testimony on its face only suggests Mr. Hysen was acknowledging Carter Lumber's claim. Second, at most, it recognizes a balance exists but does not admit that the balance is correct. Again, Carter Lumber fails to provide evidence of an "account stated."

As to construction supplies obtained by Echelon from the State Police. These "supplies" had an actual value of around $7,500 and included goods not necessarily from Carter Lumber. App. Exh. 11, pp. 10-13. At most, Carter Lumber is entitled to a credit against any amount awarded to Echelon against Carter Lumber as a result of Echelon's claims.

Moreover, it can hardly be questioned that Echelon was entitled to these materials where it had already paid Carter Lumber in excess of $100,000 without ever receiving a single benefit from the payments. Thus, the retained items had already been paid for by Echelon funds. If Carter Lumber had volunteered to return these funds, Echelon would have gladly returned the minimal materials recovered.

There is simply no doubt, as found by the Circuit Court and confirmed by the Court of Appeals, that Echelon did not "ratify" the acts of Wood. Moreover, Carter Lumber's arguments on this point are once again premised on the application of law to fact and not on a claim that the Court of Appeals misstated the law.

The Court should decline to grant leave on this issue.

VI. Carter Lumber Should Be Judicially Estopped From Asserting Its Claims Against Echelon

Even If Carter Lumber could state a claim against Echelon for an account stated, it should be judicially estopped from asserting the claim.

The doctrine of judicial estoppel provides that "a party who has successfully and unequivocally asserted a position in a prior proceeding is estopped from asserting an Inconsistent position in a subsequent proceeding." Paschke v. Retool Industries, 445 Mich. 502, 519 N.W.2d 441 (1994), *quoting* Lichon v. American Univ. Ins. Co., 435 Mich. 408, 416, 459 N.W.2d 288 (1990). The doctrine applies to situations in which the party subsequently asserting a contrary position prevailed in an earlier proceeding. SCA Services, Inc. v. General Mill Supply Co., 129 Mich. App. 224, 230-231, 341 N.W.2d 480 (1983).

In this case, Carter Lumber asserts that Echelon is responsible for the fraudulent charges of Connie Wood because of an "account stated." However, Carter Lumber has already ***successfully*** asserted that the debt was not the result of a legitimate account of Echelon Homes but the result of a theft by third-parties in a lawsuit before Oakland County Circuit Judge Alice Gilbert.

In Oakland County Circuit Court Case No. 00-027900-CK, Carter Lumber filed suit against Connie Wood, Michael Wood, Ronald Lobenstein, Sherrie Lobenstein and Jerry Garrison alleging that these defendants had fraudulently obtained supplies and materials on the account of Echelon. *See* Complaint, App. Exh. 13, ¶¶ 8-16. Carter Lumber went on to allege that the defendants conspired together to defraud Carter Lumber. Complaint, App. Exh. 13, ¶¶ 17-20.

In addition, Carter Lumber, as it does before this Court, asserted a claim for account stated against the defendants and admitted that Carter Lumber "sold and delivered to Defendants[12] certain goods, services, wares and merchandise upon open account upon the promise of Defendants to pay." App. Exh. 13, Complaint, ¶ 22.

Thus, in a lawsuit filed ***before*** the action now being considered by this Court, Carter Lumber admits that the debt: (1) was created fraudulently by persons other than Echelon; (2) was the obligation of parties other than Echelon; and (3) resulted from the conversion of Carter Lumber's property by persons other than Echelon.

Critically, Judge Gilbert relied upon these allegations, Including the Affidavit of Mr. Stoychoff, Carter Lumber's counsel, attached to the Complaint against the Woods and Lobensteins, when she entered Judgment against Sherrie and Ron Lobenstein. *See* Judgments, App. Exh. 14.

The proof of Judge Gilbert's reliance is found in the amount of the Judgment. Judge Gilbert entered Judgment against the Lobensteins in the amount of $80,963.46 (plus interest and costs) even though the amount of the unpaid debt allegedly owed to Carter Lumber was only $26,987.82. $80,963.46 is exactly ***treble*** $26,987.82. Carter Lumber's only claim that was subject to a treble damage award was the claim for conversion. *See* MCL 600.2919a. Thus, Judge Gilbert must have relied upon the allegations that the Lobensteins ***converted*** Carter Lumber's

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12 The term "Defendants" does not Include Echelon as identified in the

property when she entered the Judgments. Therefore, there is at least "some" evidence that "the court in the earlier proceeding accepted [Carter Lumber's] position as true." Paschske, 445 Mich. at 510.

If Carter Lumber's goods were "converted" by the Lobensteins, then the claim that Echelon is somehow responsible under a theory of account stated or contract is inconsistent. This is particularly true where, as here, Carter Lumber makes no claim that Echelon can be responsible for the tortious acts of the Lobensteins under a theory of "apparent authority." In other words, if the goods were stolen by the Lobesteins, as Carter Lumber successfully asserted, there is no basis for finding that Echelon was contractually obligated to pay for the stolen merchandise.

Moreover, if this Court allows Cart Lumber to recover in this case, Carter Lumber will receive a windfall as it will have a judgment against the Lobensteins for three time the amount of the alleged debt plus a judgment against Echelon for the base amount of that judgment under Inconsistent theories.

Therefore, Carter Lumber should be judicially estopped from asserting its claim for "account stated" against Echelon and the Court should affirm the ruling of the Circuit Court in dismissing Carter Lumber's claim.

VII. The Court Of Appeals Dismissed the Conversion Claim

Carter Lumber argues that it should not be liable for conversion. The Court of Appeals agreed, and Echelon does not seek leave on this issue.

Complaint before Judge Gilbert.

VIII. Carter Lumber "Knowingly" Aided And Abetted Wood's Conversion Or Embezzlement

In its questions presented, Carter Lumber purports to challenge whether it may be liable for aiding and abetting conversion. *See* Question Presented IV to Carter Lumber's Leave to Appeal Application. However, the only discussion in its brief concerns a direct claim for "conversion" and does not address a statutory aiding and abetting claim. Moreover, while the statutory claim is referred to as "aiding and abetting conversion," it was more properly labeled "aiding and abetting conversion OR theft OR embezzlement." That is, conversion is not a required element of the claim. The following discussion is provided to address what Carter Lumber apparently would have improperly challenged in Question Presented IV had it thought to do so.

It is a basic principle of Michigan law that a person who aids and abets the criminal or tortious conduct of another is jointly and severally liable for the harm caused. *See* L A Young Spring & Wire Corp. v. Falls, 307 Mich. 69, 101 and 107, 11 N.W.2d 329 (1943) (one who aids and abets a tortfeasor is jointly and severally liable for harm caused by tortfeasor); Tomkovich v. Mistevich, 222 Mich. 425, 192 N.W.2d 639 (1923) *Prosser and Keeton on the Law of Torts*, § 46 at 324 (5th ed. 1984) (all those who lend aid to the wrongdoer are equally liable with him); 1 Cooley, *Law of Torts* 244 (3d ed. 1906) ("All who actively participate in any manner in the commission of a tort, or who . . . aid or abet its commission, are jointly and severally liable therefore"); *Restatement (2d) Torts*, § 876. *See also* Whitney v. Citibank, *NA*, 782 F.2d 1106 (2d Cir. 1986)

By statute, Michigan provides that a party who aids and abets in a conversion, theft or embezzlement is liable for that conversion, theft or embezzlement:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise. [MCL 600.2919a]

Pursuant to MCL 600.2919a, the critical inquiry is whether the aider and abettor has knowledge of another's conversion, theft or embezzlement. Thus, the proper analysis requires an examination of whether Echelon produced evidence sufficient to create a question of fact for a jury regarding Carter Lumber's knowledge of the Fraudulent Scheme.

A. Carter Lumber Had Actual Knowledge Of The Fraudulent Scheme

A jury is entitled to conclude that Carter Lumber had actual knowledge of the Fraudulent Scheme as demonstrated by Carter Lumber's execution of the false lien waivers and acceptance of the title company checks for jobs Carter Lumber knew it never delivered materials to.

Indeed, the knowledge of Carter Lumber's employees is attributable to it for purposes of liability. *See* People v. American Med Ctrs of Michigan, Ltd, 118 Mich. App. 135, 324 N.W.2d 782 (1982) (a medical clinic was convicted of medical fraud based on knowledge of employees); Upjohn v. New Hampshire Ins Co, 438 Mich.

197, 476 N.W.2d 392 (1991) (combined knowledge of corporate employees may be imputed to a corporation); Gordon Sel-Way v. Spence Bros, Inc, 177 Mich. App. 116, 124; 440 N.W.2d 907 (1989), *aff'd in part and rev'd in part on other grounds*, 438 Mich. 488 (1991 (combined knowledge of employees may be imputed to a corporation).

There is ample evidence for a jury to conclude that Carter Lumber had knowledge of the Fraudulent Scheme and aided and abetted Wood by, among other things, allowing her to:

- open an unauthorized credit account (Application, App. Exh. 4);
- Increase the credit line on the account by over $30,000 in a one year period (Rink's Dep., App. Exh. 3, pp. 80-81);
- appoint whomever she chose as authorized persons for use of the account (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Receipt, App. Exh. 6);
- have unauthorized users charge on the account (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Receipt, App. Exh. 6);
- change the billing address of the account to an address she controlled (Invoices with false address, App. Exh. 7); and
- have tens of thousands of dollars of goods delivered to her personal home and that of her brother, Ron Lobenstein (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Rinks Dep., App. Exh. 3, pp. 42-43).

Carter Lumber allowed all of this without once contacting the owner's of Echelon even though Echelon was among the store's best customers. (Rinks Dep., App. Exh. 3, pp. 79-80.)

Moreover, to secure its unlawful payments, Carter Lumber signed lien waivers for projects to which it had no knowledge of ever having provided goods. (False Lien Waiver, App. Exh. 9 and Rinks Dep., App. Exh. 3, pp. 92-93.) In short, Carter Lumber engaged in active fraud to facilitate the theft of Echelon's property.

Thus, a jury should be allowed to review the direct evidence of misconduct possessed by Echelon, including the execution of lien waivers for which Carter Lumber had no evidence to support, to determine whether it had "knowledge" of the Fraudulent Scheme.

B. At A Minimum, Carter Lumber's Knowledge Can Be Found From Its Duty To Inquire Into The Fraudulent Acts And To Not Act With Willful Blindness

It was on this basis that the Court of Appeals found that Echelon had ample evidence to support its claims.

Courts have frequently found "knowledge" for imposing criminal liability where a defendant acted with willful blindness or was on inquiry notice of facts a reasonable person would have discovered. *See, e.g.,* United States v. Prince, 214 F.3d 740, 759-60 (6th Cir. 2000) (affirming willful blindness instruction to find criminal liability in a case requiring knowledge).

In Thomas Estate v. Manufacturers Nat'l Bank of Detroit, 211 Mich. App. 594, 601,536 N.W.2d 579 (1995) the court held that "[k]nowledge of facts putting a

person of ordinary prudence on inquiry is equivalent to actual knowledge of the facts which a reasonably diligent inquiry would have disclosed." *See also* Estate of Goldman v. Nat'l Bank of Detroit, 236 Mich. App. 517, 523, 601 N.W.2d 126 (1999)) In Thomas Estate the defendant bank was in possession of a document that, if reviewed, would have provided it with the information it claimed not to possess. The court found that the failure to conduct a reasonable diligent inquiry was no excuse for the bank's actions, and the bank was found to have knowledge of the relevant information.

The Thomas Estates opinion cites this Court's decision in Hudson v. O&A Electric Co-Operative, 332 Mich. 713, 52 N.W.2d 565 (1952) in support of its holding. There, this Court acknowledged that a company may not close its eyes to the facts before it and expect to avoid being charged with knowledge of the very facts so ignored:

> A person is chargeable with constructive notice when, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries and does not make, but studiously avoids making, the obvious inquiries, he must be taken to have notice of those facts which, had he used ordinary diligence, would have been readily ascertained. [*Id.* at p. 716.]

Here, Carter Lumber possessed information that was, at a minimum, highly suspicious and requiring further inquiry, Including, but not limited to: (1) requests to sign false lien waivers (Rinks Dep., App. Exh. 3, pp. 92-92 and App. Exh. 9, False Lien Waiver); (2) a request to change the billing address to Highland where Echelon was known to be a Brighton company (App. Exh. 7); (3) the numerous deliveries of

thousands of dollars of materials to the home of an Echelon employee in Pontiac (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Rinks Dep., App. Exh. 3, pp. 42-43); and (4) the use of the "Echelon" account by unauthorized persons (Lobenstein Dep., App. Exh. 5, pp. 29-31 and Receipt, App. Exh. 6).

In short, ample evidence was presented to the Circuit Court to support that, at a minimum, a factual issue regarding Carter Lumber's knowledge existed and should be presented to a jury.

Again, Carter Lumber does not discuss this claim and provides no reason as to why leave should be granted.

IX. Carter Lumber Committed Fraud

The Court of Appeals concluded that Echelon could present a claim for fraud.

Fraud consists of:

> the following elements: (1) the defendant made a material representation; (2) the representation was false; (3) when the defendant made the representation, the defendant knew that it was false, or made it recklessly, without knowledge of its truth as a positive assertion; (4) the defendant made the representation with the intention that the plaintiff would act upon it; (5) the plaintiff acted in reliance upon it; and (6) the plaintiff suffered damage. [Diponio Construction Company, Inc. v. Rosati Masonry Company, Inc., 246 Mich. App. 43, 51, 631 N.W.2d 59 (2001)

Here, Carter Lumber represented that it delivered or supplied goods to legitimate Echelon construction projects when it signed the false lien waivers and when it accepted checks from the title company. *See* False Lien Waiver, App. Exh. 9 and Checks, App. Exh. 8.

These representations were false. Carter Lumber had no information to suggest that it supplied goods to any home for which it signed lien waivers or for which it accepted checks as payment from the title company. Rinks Dep., App. Exh. 3, pp. 89-93.

Because Carter Lumber had absolutely no information to suggest its statements were truthful, it acted, at a minimum, recklessly in making the assertions found in the lien waiver and in the acceptance of the title company checks. Papin v. Demiski, 17 Mich. App. 151, 156, 169 N.W.2d 351 (1969) ("If one obtains the property of another, by means of untrue statements, though in ignorance of their falsity, he must be held responsible as for a legal fraud." *quoting* Justice Cooley in Converse v. Blumrich, 14 Mich. 109, 123 (1866), *aff'd* 383 Mich. 561, 177 N.W.2d 166 (1970). Clearly, the Circuit Court's focus on "intent" is an insufficient basis for dismissing the fraud claim where Carter Lumber acted recklessly.

Further, Carter Lumber knew that the lien waiver would be used by Echelon and its agents to withdraw funds from Echelon Homes' construction accounts and Carter Lumber intended that Echelon Homes rely upon the statements. Carter Lumber intended that Echelon Homes would rely upon Carter Lumber's representations that it was entitled to cash the checks issued by the title company to Carter Lumber.

In reliance upon Carter Lumber's representations, Echelon Homes issued checks to Carter Lumber from its construction accounts and honored checks issued to Carter Lumber from its construction accounts.

Carter Lumber's sole, fact based, argument is that its manager denied having known of the scheme. This statement ignores the fact that knowledge may be proven by willful blindness and that fraud may be committed by reckless conduct.

Carter Lumber also ignores its own admission that a fraud was committed against the title company when Wood presented the false lien waivers. Carter Lumber's Summary Disposition Brief at p. 2, App. Exh. 14.[13]

There simply is no error or even hint of a change to Michigan jurisprudence that requires leave on this issue.

X. Carter Lumber Is Liable For Aiding And Abetting Wood's Breaches of Fiduciary Duty

Finally, Carter Lumber claims that it should not be sent to trial on an aiding and abetting breach of fiduciary duty claim. Carter Lumber does so by just ignoring the Court of Appeal's Opinion in this case and by ignoring the precedent on which the Court of Appeals relied.

First, Carte Lumber suggests why Echelon has not stated a claim for "civil conspiracy." However, Echelon has not asserted a civil conspiracy claim and the

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[13] Carter Lumber simply cannot argue that it was "duped" into signing a lien waiver where it had no evidence that it ever supplied goods to the homes for which

Court of Appeals never addressed a civil conspiracy claim. Instead, the Court of Appeals recognized the separate and distinct claim for aiding and abetting a breach of fiduciary duty. Opinion, pp. 10-11. The fact is, Carter Lumber did aid and abet Wood's in breaching her fiduciary duties.

Echelon's trusted employee and agent, Wood, was a fiduciary of Echelon. As such, Wood owed a duty of good faith to Echelon and was not permitted to act for herself at Echelon's expense. Production Finishing Corp. v. Shields, 158 Mich. App. 479, 486-487, 405 N.W.2d 171 (1987) Michigan Crown Fender Co. v. Welch, 211 Mich. 148, 159-160, 178 N.W.2d 684 (1920) Central Cartage Co. v. Fewless, 232 Mich. App. 517, 524-25, 591 N.W.2d 422 (1999)

Moreover, by assisting Wood in her breaches, Carter Lumber may also be held liable. *See* 1 Cooley, *Law of Torts* 244 (3d ed. 1906) ("All who actively participate in any manner in the commission of a tort, or who ... aid or abet its commission, are jointly and severally liable therefor"); Prosser, *Law of Torts* 292 (4th ed. 1971) ("all those who . . . lend aid . . . to the wrongdoer . . . are equally liable with him"); *Restatement (2d) Torts*, § 876 ("[f]or harm resulting to a third person from the tortious conduct of another, one is subject to liability if he . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other. . . .").

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the lien waivers were signed. Rinks Dep., App. Exh. 3, pp. 89-93. Moreover, even if "duped," its actions were reckless.

The Court of Appeals, relying upon, among other cases, Hayes-Albion Corp. v. Kuberski, 421 Mich. 170, 187, 364 N.W.2d 609 (1984), confirmed that Michigan recognizes the claim asserted by Echelon.

There is simply nothing novel about the Court of Appeals' decision on this issue and Carter Lumber does not even attempt to identify one. Leave, therefore, should be denied.

CONCLUSION

For the reasons stated above, this Court should deny leave to appeal in this matter.

Respectfully submitted,

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Dated: May 10, 2004
WK056549.DOC;1

STATE OF MICHIGAN

IN THE SUPREME COURT

ECHELON HOMES, LLC,
Plaintiff/Counter-Defendant/Appellee,

SC: 125995

v.

Docket Nos. 125994 & 125995
Court of Appeals No. 243112

CARTER LUMBER COMPANY,
Defendant/Counter-Plaintiff/Appellant,

and

ECHELON HOMES, LLC,
Plaintiff/Counter-Defendant,

Court of Appeals No. 243180

v.

CARTER LUMBER COMPANY,
Defendant/Counter-Plaintiff.

Trial Court No. 01-029345-CZ
Oakland County Circuit Court
Judge Eugene Schnelz

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125994-5

APPELLEE ECHELON HOMES' SUPPLEMENTAL BRIEF OPPOSING APPLICATION FOR LEAVE TO APPEAL RE: CONSTRUCTIVE KNOWLEDGE

ORAL ARGUMENT REQUESTED

PROOF OF SERVICE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF QUESTION INVOLVED

1. Whether constructive knowledge may be used to establish liability for aiding and abetting conversion under MCL 600.2919a?

Plaintiff/Counter-Defendant Echelon Answers: Yes.

Defendant/Counter-Plaintiff Answers: No.

ARGUMENT

I. Constructive Knowledge May Be Used To Establish The "Knowledge" Element of MCL 600.2919a

Michigan's aiding and abetting conversion statute provides:

> A person damaged as a result of another person's buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property when the person buying, receiving, or aiding in the concealment of any stolen, embezzled, or converted property knew that the property was stolen, embezzled, or converted may recover 3 times the amount of actual damages sustained, plus costs and reasonable attorney's fees. This remedy shall be in addition to any other right or remedy the person may have at law or otherwise. [MCL 600.2919a]

This Court seeks additional argument regarding whether "constructive knowledge" may be a means by which "knowledge" may be established under MCL 600.2919a. The answer is an unqualified "yes" in this matter. As discussed below, the use of constructive knowledge is widely accepted in both the civil and criminal case law. Under such circumstances, this Court should be wary of granting leave and changing what is a bedrock of Michigan civil *and criminal* jurisprudence.

A. Michigan Courts Routinely Use Constructive Knowledge To Establish Liability Under The Criminal Counterpart To MCL 600.2919a

It would be anomalous for this Court to reject the use of "constructive knowledge" to establish liability under MCL 600.2919a where Michigan courts routinely use constructive knowledge under the penal statutory equivalent to the civil aiding and abetting statute. In striking similarity to MCL 600.2919a, MCL 750.535 provides, in relevant part: "A person shall not buy, receive, possess, conceal,

or aid in the concealment of stolen, embezzled, or converted money, goods, or property knowing the money, goods, or property is stolen, embezzled, or converted."[1]

This Court has endorsed the use of constructive knowledge in criminal convictions for receiving stolen property, stating: "Guilty knowledge means not only actual knowledge, but constructive knowledge, through notice of facts and circumstances from which guilty knowledge may fairly be inferred." People v. Tantenella, 212 Mich. 614, 620, 180 N.W. 474 (1920). And the Michigan Court of Appeals has long followed this Court's decision in Tantenella in affirming convictions and jury instructions allowing constructive knowledge to prove guilt. *See, e.g.*, People v. Gould, 225 Mich. App. 79, 87, 570 N.W.2d 140 (1997) ("When knowledge is an element of an offense, it includes both actual and constructive knowledge"), lv. app. denied 459 Mich. 955, 590 N.W.2d 972 (1999); People v. Scott, 154 Mich. App. 615, 616, 397 N.W.2d 852 (1986) ("Guilty knowledge means not only actual knowledge, but also constructive knowledge through notice of facts and circumstances from which guilty knowledge may be inferred").

The Court of Appeals has routinely reinforced the use of circumstantial evidence to justify the inference of a defendant's knowledge, stating, "The circumstances accompanying the transaction may justify the inference by the jury that the defendant received the goods on belief that they were stolen." People v.

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[1] Indeed, a further similarity between the two statutes can be found in the fact that MCL 750.535(2) also provides for treble damages, like MCL 600.2919a, as a fine for the unlawful conduct.

Wolak, 110 Mich. App. 628, 632, 313 N.W.2d 174 (1981); People v. Brown, 126 Mich. App. 282, 336 N.W.2d 908 (1983) (finding circumstantial evidence sufficient for jury to infer that defendant knew property was stolen); People v. Clark, 154 Mich. App. 772, 775, 397 N.W.2d 864 (1986) ("Guilty knowledge that property received or concealed was stolen can be shown by direct or circumstantial evidence"); People v. Lauzon, 84 Mich. App. 201, 269 N.W.2d 524 (1978) ("Guilty knowledge of the fact that goods were previously stolen is essential element of the crime of receiving and concealing stolen goods . . . guilty knowledge may be actual or constructive" (internal citation omitted)).

Michigan's use of constructive knowledge is not unique. *See, e.g.*, Spitzer v. Commonwealth, 233 Va. 7, 9, 353 S.E.2d 711 (1987) (holding that "guilty knowledge is an essential element of the offense [of receiving stolen goods] as defined by the statute, but absent proof of an admission against interest, such knowledge necessarily must be shown by circumstantial evidence."); Lewis v. State, 573 So. 2d 713, 715 (Miss. 1990) (finding that if a reasonable person would know from the circumstances that the property was stolen, then the court would find the evidence sufficient to show guilty knowledge); People v. Mendoza, 18 Cal.4th 1114, 1133, 959 P.2d 735 (1998) (aiding and abetting liability is not contingent on actual knowledge that a crime will occur; the crime need only be reasonably foreseeable); People v. Juehling, 10 Cal. App. 2d 527, 531, 52 P.2d 520 (1935) (statutory requirement as to guilty knowledge may be met by admissible evidence from which the element of guilty knowledge properly may be inferred); Commonwealth v. White, 233 Pa.

Super. 195, 334 A.2d 757 (1975) (holding that the element of defendant's guilty knowledge may be established by direct evidence of knowledge or by circumstantial evidence from which it can be inferred that he had reasonable cause to know that the property was stolen).

In the case at bar, there is ample evidence, as discussed in Echelon's brief in response to Carter Lumber's application for leave to appeal, for a jury to infer that Carter Lumber had knowledge of Wood's embezzlement and theft based on the existing circumstances. As in any criminal case, this evidence can be used to establish "knowledge" for purposes of violating MCL 600.2919a. The use of evidence under such circumstances is not novel or unique and does not warrant this Court's review of a well established legal principle.

Again, it would be anomalous to allow constructive knowledge to establish criminal liability with its attendant consequences, yet prohibit it in the civil context.

B. Courts Routinely Use Constructive Knowledge To Establish Liability In Civil Cases

Using constructive knowledge is also a common practice in civil tort law in Michigan. Indeed, this Court has endorsed the use of constructive knowledge on many occasions. *See* York v. City of Detroit, 438 Mich. 744, 475 N.W.2d 346 (1991) (deliberate indifference in civil rights case could be proven by actual or constructive knowledge); Peters v. State, 400 Mich. 50, 63-64, 252 N.W.2d 799 (1977) (finding that sufficient evidence existed to conclude that State had at least constructive knowledge of defective condition to impose liability); Bradley v. Burdick Hotel, 306

Mich. 600, 603, 11 N.W.2d 257 (1943) (property owner can be held liable where it had constructive notice of dangerous condition).

Other jurisdictions also allow the use of circumstantial evidence to prove knowledge, particularly when the defendant is the beneficiary of the underlying illegal activity. *See* Gould v. American-Hawaiian S.S. Co., 535 F.2d 761, 779-780 (3rd Cir. 1976) citing Northway, Inc. v. TSC Industries, Inc., 512 F.2d 324, 339 (7th Cir. 1975) (stating that the requirement of knowledge may be less strict where the alleged aider and abettor derives benefits from the wrongdoing but that the proof must establish conscious involvement in impropriety *or* constructive notice of intended impropriety (emphasis added)); HBE Leasing Corp. v. Frank, 48 F.3d 623, 636 (2d Cir. 1995) (constructive knowledge of fraudulent schemes will be attributed to transferees who were aware of circumstances that should have led them to inquire further into the circumstances of the transaction, but who failed to make such inquiry, where lenders "knew, or should have known" that monies would not be retained by debtor).

Courts in other jurisdictions have also found that the issue of constructive knowledge is a question for the jury, an issue upon which summary judgment may not be granted. *See* Robertson v. Seidman & Seidman, 609 R.2d 583, 591 (2d Cir. 1978) ("Issues of due diligence and constructive knowledge depend on inferences drawn from the facts of each case. When conflicting inferences can be drawn from the facts, the question is one for the jury").

There is little importance in the issue presented to warrant the Court's grant of leave in this matter where the Court of Appeals simply followed long established principles.

C. Willful Blindness Is A Well Established Mechanism To Establish Knowledge

The use of willful blindness to establish civil liability is well recognized in Michigan. In Hudson v. O&A Electric Co-Operative, 332 Mich. 713, 52 N.W.2d 565 (1952), this Court acknowledged that a company may not close its eyes to the facts before it and expect to avoid being charged with knowledge of the very facts so ignored:

> A person is chargeable with constructive notice when, having the means of knowledge, he does not use them. If he has knowledge of such facts as would lead any honest man, using ordinary caution, to make further inquiries and does not make, but studiously avoids making, the obvious inquiries, he must be taken to have notice of those facts which, had he used ordinary diligence, would have been readily ascertained. [*Id.* at p. 716.]

Michigan lower courts have continued to properly apply the holding in Hudson. For example, in Thomas Estate v. Manufacturers Nat'l Bank of Detroit, 211 Mich. App. 594, 601, 536 N.W.2d 579 (1995), the Court of Appeals held that "[k]nowledge of facts putting a person of ordinary prudence on inquiry is equivalent to actual knowledge of the facts which a reasonably diligent inquiry would have disclosed." In Thomas Estate, the defendant bank was in possession of a document that, if reviewed, would have provided it with the information it claimed not to possess. The court found that the failure to conduct a reasonable diligent inquiry

was no excuse for the bank's actions, and the bank was found to have knowledge of the relevant information. *See also* United States v. Hoffman, 918 F.2d 44, 46-47 (6th Cir. 1990) ("A defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact."); and United States v. Williams, 195 F.3d 823, 826 (6th Cir. 1999) (stating "the jury could have found that appellant was ignorant, but that his ignorance resulted from willful blindness. Consequently, there was sufficient evidence to conclude that appellant had the requisite state of mind").

The use of the willful blindness or "inquiry notice" concept is not limited to Michigan. In Aetna Casualty, 219 F.3d at 536, the federal Sixth Circuit affirmed a judgment against a bank for aiding and abetting tortious conduct where the bank provided a loan under unusual circumstances and the loan was used as mechanism for fraud. In doing so, the Sixth Circuit stated:

> A bank, however, is not immune from civil aiding and abetting claims, and to the extent that its knowledge of the primary party's tortious conduct can be proven, **either by direct or circumstantial evidence**, liability will attach if the other elements are present. [219 F.3d at 536. Emphasis added.]

Willful blindness also has its place in criminal law. Indeed, forfeiture can occur in both criminal and *in rem* proceedings where property owners turn a blind eye to illegal conduct. *See* U.S. v. Prince, 214 F.3d 740, 760 (6th Cir. 2000) (In addressing convictions for various fraud and aiding and abetting charges: "We found no error in the instruction that 'a defendant's knowledge of a fact may be inferred from willful blindness to the existence of the fact'"); U.S. v. One 1988

Honda Accord, 735 F.Supp. 726, 729-30 (E.D. Mich. 1990) (willful blindness resulted in forfeiture); *see also* U.S. v. Williams, 195 F.3d 823, 825-26 (6th Cir. 1999) (using willful blindness involving illegal disposal of hazardous waste). In sum, as the Sixth Circuit stated 30 years ago: "Construing 'knowingly' in a criminal statute to include wilful blindness to the existence of a fact is no radical concept in the law." U.S. v. Thomas, 484 F.2d 909, 913 (6th Cir. 1973). There is also nothing radical about applying this concept today in a civil case and, in particular, to the facts of this case.

Other jurisdictions have applied the doctrine of willful blindness or deliberate ignorance in both civil and criminal cases to impute knowledge to a party who should know of a high probability of illegal conduct and purposely contrives to avoid learning of it. In Leary v. United States, 89 S. Ct. 1532 (1969), the United States Supreme Court cited favorable the Model Penal Code's "knowledge" definition which incorporates imputed knowledge as a method of proving knowledge under a criminal statute. Indeed, a defendant can also be said to know a fact if he "is aware of a high probability of its existence, unless he actually believes that it does not exist." Leary at 46 n.93.

The Ninth Circuit later addressed the Model Penal Code and held that:

> the substantive justification for the rule is that deliberate ignorance and positive knowledge are equally culpable. The textual justification is that in common understanding one "knows" facts of which he is less than absolutely certain. To act "knowingly," therefore, is not necessarily to act only with positive knowledge, but also to act with an awareness of the high probability of the existence of the fact in question. When

such awareness is present, "positive" knowledge is not required. [United States v. Jewell, 532 F. 22 697, 700 (9th Cir. 1976)]

Other federal circuit courts have concurred:

- United States v. Florez, 368 F.3d 1042, 1044-1045 (8th Cir. 2004): where the government had to prove that the defendant knew that a financial transaction involved proceeds from "some form of unlawful activity, . . . the evidence taken as a whole was sufficient to support an inference that even if [defendant] did not have actual knowledge [that the account was being used] for illegal activities, it was only because she chose not to investigate and effectively buried her head in the sand."

- United States v. Schnabel, 939 F.2d 197, 203 (4th Cir. 1991): "willful blindness is a form of constructive knowledge that allows the jury to impute the element of knowledge to the defendant if the evidence indicates that he purposely closed his eyes to avoid knowing what was taking place around him."

- United States v. Sharpe, 193 F.3d 852, 871 (5th Cir. 1999): evidence was sufficient to support deliberate ignorance instruction where the defendant knew of the high probability of illegal conduct and purposely contrived to avoid learning about it.

- United States v. Rodriguez, 53 F.3d 1439, 1447 (7th Cir. 1995): "It is well settled that willful blindness . . . is the legal equivalent to knowledge." (internal quotation marks and citations omitted).

- United States v. Gruenberg, 989 F.2d 971, 974 (8th Cir. 1998): finding a willful blindness instruction is proper where evidence supports an inference of "deliberate ignorance."

- United States v. Perez-Tosta, 36 F.3d 1552, 1564 (11th Cir. 1994) ("A 'deliberate ignorance' instruction is appropriate when 'the facts . . . support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution.'" *quoting* United States v. Rivera, 944 F.2d 1563, 1571 (11th Cir. 1991)).

The concept of willful blindness has also been applied in many other areas, including (1) commodities cases, *see, e.g.,* CFTC v. Sidoti, 178 F.3d 1132, 1136-37 (11th Cir. 1999) ("the element of knowledge may be inferred from deliberate acts amounting to willful blindness to the existence of fact or acts constituting conscious purpose to avoid enlightenment"), (2) medicare fraud cases, *see, e.g.,* United States v. Baxter Int'l, Inc., 345 F.3d 866, 902-903 (11th Cir. 2003) (finding that the government had sufficiently alleged that defendants structured a settlement in a manner so as to avoid learning any identifying information about the class members, including their Medicare eligibility), and (3) copyright actions, *see, e.g.,* In

re Aimster Copyright Litig., 334 F.3d 643, 650 (7th Cir. 2003) ("Willful blindness is knowledge, in copyright law, where indeed it may be enough that the defendant should have known of the direct infringement").

This Court should decline to grant leave on the willful blindness issue where the Court of Appeals' opinion is consistent with established civil and criminal precedents in Michigan and other jurisdictions. Indeed, the novel result would be to overturn this well established policy.

D. The Legislature's Use Of "Knowledge" Without The Modifier "Actual" Knowledge Suggests The Use Of Constructive Knowledge May Be Used To Impose Liability

As discussed above, this Court has routinely allowed constructive knowledge to be used where a statute refers to knowledge. This Court has deviated from that position where the legislature passed a statute expressly calling for "actual knowledge."

For example, in Travis v. Dreis & Krump Mfg. Co., 453 Mich. 149, 551 N.W.2d 132 (1996), this Court reviewed whether constructive knowledge could be used to establish employer liability under the worker's compensation act which specifically used the words "actual knowledge." In construing that statutory language, this Court stated:

> Because the Legislature was careful to use the term 'actual knowledge,' and not the less specific word 'knowledge,' we determine that the Legislature meant that constructive, implied, or imputed knowledge is not enough. Nor is it sufficient to allege that the employer should have known, or had reason to believe, that injury was certain to occur. A plaintiff may establish a

> corporate employer's actual knowledge by showing that a supervisory or managerial employee had actual knowledge that an injury would follow from what the employer deliberately did or did not do." [453 Mich. at 173-174. Citations omitted.]

By contrast here, the legislature did use the more general "knowledge" language without the "actual" knowledge modifier. Here, had the legislature desired a different result, it could have amended or added language to MCL 600.2919a requiring "actual" knowledge as it did in the workers' compensation setting. Having left out the modifier, the legislature must have intended that constructive knowledge may be used to prove knowledge under the aiding and abetting statute.

CONCLUSION

For the reasons stated above, this Court should deny leave to appeal in this matter as the Court of Appeals correctly held that constructive knowledge may be used to establish that a party aided and abetted conversion under MCL 600.2919a.

Respectfully submitted,

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Dated: December 2, 2004

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STATE OF MICHIGAN
SUPREME COURT

ECHELON HOMES, L.L.C.,

Plaintiff/Counter-Defendant/Appellant,

vs.

Court of Appeals No. 243112
Trial Court No. 01-029345-CZ

CARTER LUMBER COMPANY,

Defendant/Counter-Plaintiff/Appellee.

and

ECHELON HOMES, L.L.C.,

Plaintiff/Counter-Defendant/Appellant,

vs.

Court of Appeals No. 243180
Trial Court No. 01-029345-CZ

CARTER LUMBER COMPANY,

Defendant/Counter-Plaintiff/Appellee.

125994-5

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CARTER LUMBER COMPANY'S SUPPLEMENTAL BRIEF PURSUANT TO ORDER OF THE COURT DATED NOVEMBER 5, 2004

PROOF OF SERVICE

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TABLE OF CONTENTS

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INDEX OF AUTHORITIES

Page

Cases

Statutes

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STATEMENT IDENTIFYING AUTHORITY FOR THIS SUPPLEMENTAL BRIEF

On November 5, 2004, this Court stated:

> "On order of the Court, the Application for leave to appeal the March 30, 2004 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), we direct the Clerk to schedule oral argument on whether to grant the Application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall limit their presentation to whether the Court of Appeals correctly held that constructive knowledge that property is stolen, embezzled, or converted is sufficient to impose liability under MCL 600.2919a. Supplemental briefs may be filed within 28 days of the date of this order."

As a result, Carter Lumber submits this supplemental brief addressing the above issue.

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Order

Entered: November 5, 2004

125994-5

ECHELON HOMES, L.L.C.,
Plaintiff/Counter-
Defendant/Appellee,

v

SC: 125994
COA: 243112
Oakland CC: 01-029345-CZ

CARTER LUMBER COMPANY,
Defendant/Counter-
Plaintiff/Appellant.
_____/

ECHELON HOMES, L.L.C.,
Plaintiff/Counter-
Defendant/Appellee,

v

SC: 125995
COA: 243180
Oakland CC: 01-029345-CZ

CARTER LUMBER COMPANY,
Defendant/Counter-
Plaintiff/Appellant.
_____/

On order of the Court, the application for leave to appeal the March 30, 2004 judgment of the Court of Appeals is considered and, pursuant to MCR 7.302(G)(1), we direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action permitted by MCR 7.302(G)(1). The parties shall limit their presentation to whether the Court of Appeals correctly held that constructive knowledge that property is stolen, embezzled, or converted is sufficient to impose liability under MCL 600.2919a. Supplemental briefs may be filed within 28 days of the date of this order.

WEAVER, J., would not limit oral argument but would allow the parties to argue all the issues raised in the application and response.

d1102

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

November 5, 2004

Clerk

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE COURT OF APPEALS INCORRECTLY HELD THAT CONSTRUCTIVE KNOWLEDGE THAT THE PROPERTY IS STOLEN, EMBEZZLED OR CONVERTED IS SUFFICIENT TO IMPOSE LIABILITY PURSUANT TO MCL 600.2919(a)?

Carter Lumber Company says "Yes".

Echelon Homes says "No".

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STATEMENT OF FACTS

Carter Lumber relies on its Statement of Proceeding and Facts contained in its Brief submitted with its Application for Leave To Appeal.

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ARGUMENT

I. THE COURT OF APPEALS INCORRECTLY HELD THAT CONSTRUCTIVE KNOWLEDGE OF PROPERTY THAT IS STOLEN, EMBEZZLED, OR CONVERTED IS SUFFICIENT TO IMPOSE LIABILITY PURSUANT TO MCL 600.2919(a).

Carter Lumber Company did not have a duty to investigate whether the purchases that were being made by Echelon's employee, Carmella Woods, were authorized by Echelon. The concept of "constructive knowledge" is inapplicable to this matter since constructive knowledge is a concept used in causes of action alleging negligence or by statute where a notice period is imposed. As a result, the Court of Appeals erred in reversing the Trial Court's dismissal of Echelon's claim alleging statutory conversion by Carter pursuant to MCL 600.2919(a).

Article 2 of the Uniform Commercial Code (MCL 440.2101 - 440.2725) does not create a duty requiring a vendor to investigate if an agent or employee has authority to make purchases for its employer. It is clear from Article 2 of the UCC that neither the vendor or customer is responsible for investigating and policing the others' employees.

Further, constructive notice is a concept that is applicable to negligence or imposed by statute. For example, in cases of active negligence, arising where a defendant or his or her agents have caused a dangerous condition on the defendant's premises, proof of notice of that condition is unnecessary. *Williams v Borman's Food, Inc.*, 191 Mich App 320; 477 NW2s 425 (1991).

Also, where there is a street defect, constructive knowledge of the condition may be attributable to a city if the defect exists for at least thirty (30) days before an accident. What the constructive knowledge provisions means in essence is that if the city does not repair a pothole

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within 30 days, then the city may be negligent. *Sable v Detroit*, 1 Mich App 87; 134 NW2d 374 (1965).

In the matter at hand, Echelon has not cited any statute or case law stating that a vendor has a duty to a vendee to investigate the conduct of the vendee's agent in purchasing goods from a vendor. The cases that Echelon cited to the Court of Appeals were *In re: Thomas,* 211 Mich App 594; 536 NW2d 579 (1995) and *Deputy Commissioner of Agriculture v O. & A. Electric Co-Operative, Inc.,* 332 Mich 713; 52 NW2d 565 (1952). However, these cases are not applicable to this matter.

In the matter of *In re: Thomas Estates, supra,* Richard Sable, as conservator of the estate of George J. Thomas, a minor, petitioned the Macomb County Probate Court to surcharge Dawn Goodhue and Manufacturers National Bank of Detroit after the bank released funds of the estate to Goodhue. Originally Goodhue had been appointed by the Probate Court as the guardian of the minor. She moved with her husband to Vermont along with the minor. Before Ms. Goodhue's Letters of Authority as guardian expired, a Vermont probate court appointed the Goodhues as co-guardian and had entered an order directing Manufacturers National Bank to release to the Goodhues funds of the estate held by Goodhue as guardian. Goodhue's Letters of Authority from the Macomb County Probate Court had expired by the time Manufacturers National Bank of Detroit had released the funds. The Macomb County Probate Court surcharged the bank and ordered it to pay petitioner's attorney fees ruling that the funds had been improperly released.

In its Opinion, the Court stated that MCL 700.491; MSA 22.5491 had been violated, thereby making the release of funds invalid. The above statute provides that property of a protected person held in Michigan may not be released to a foreign conservator unless the conservator

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provides proof of appointment and an affidavit stating that a protected proceeding related to the protected person is not pending in Michigan. The Goodhues did not present such an affidavit.

Further, Manufacturers National Bank of Detroit sought protection as an innocent party dealing with conservators pursuant to MCL 700.483; MSA 27.5483. The statute provides that a person who, in good faith, assists a conservator in a transaction is protected as if the conservator properly exercised power.

However, the Court held that this protection was not applicable to the bank since the final Letters of Authority expressly stated on its face that they expired on December 25, 1987. Additionally, on March 3, 1988, the banks released the funds to the Goodhues after the final Letter of Authority issued by the Macomb County Circuit Court expired. Thus, the bank had no authority to release the funds to the Goodhues.

In *Deputy Commissioner of Agriculture v O. & A. Electric Co-Operative, Inc., supra*, the plaintiff brought mandamus to require defendant to remove temporarily its power lines and power poles from a drain right-of-way because they interfered with the free movement of the excavating equipment used in connection with the cleaning, deepening and widening of the drain.

Defendant electric company, whose agents had seen that the ditch had been dug and dirt piled alongside together with statutory provisions relative to making of returns for easement for ditches had sufficient notice to enable the company to direct its inquiry to the office of the drain commissioner where pertinent facts as to the extent of the right-of-way might be ascertained. Thus, the electric company ignored certain statutory provisions that would have assisted it in making its determination as to ownership of the property.

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In the matter at hand, the Court of Appeals in its Opinion stated that Echelon produced little evidence from which it could demonstrate that Carter or any of its employees had actual knowledge of Ms. Wood's scheme to embezzle funds from Echelon. However, the Court of Appeals held that even though Carter had no actual knowledge, there was sufficient circumstantial evidence to create a question of fact as to determine whether Carter had constructive knowledge. The Court further held that Carter and its employees were placed on "inquiry notice" and supported its position citing the *Deputy Commissioner of Agriculture, supra,* and *In re: Thomas, supra.*

Carter Lumber contends that the Court of Appeals erred since both of these cases are inapplicable to the matter at hand. As seen in the *Thomas* case, the Court found that Manufacturer's National Bank had violated a statute and ignored Letters of Authority that were in its possession. Thus, they were liable as a result of improperly releasing the funds to the Goodhues. In the next case utilized by the Court, *Deputy Commissioner of Agriculture, supra,* the electric company also ignored necessary statutes and certain physical evidence.

In the matter at hand, Carter did not violate any statutes or breach any duty as to Echelon. MCL 600.2919(a) is a statutory cause of action for those who aid in the conversation of property. Statutory conversion under MCL 600.2919(a) consists of knowingly buying, receiving or aiding in the concealment of any stolen, embezzled or converted property. This is an intentional tort. *Warren Tool Co. v Stephenson*, 11 Mich App 274; 161 NW2d 133 (1968). The above statute compartmentalizes the actions of those assisting and the actions of the principle. *Marshall Lasser, P.C. v George*, 252 Mich App 104; 651 NW2d 158 (2002).

Aiding and abetting is anyone who intentionally assists someone else in committing a crime. *People v Burgress*, 67 Mich App 214; 240 NW2d 485 (1976). The aider and abettor must

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have intended the commission of the crime alleged or must have known that other persons intended its commission at the time of giving the assistance. *People v Burgress, supra.* As a result, the conversion statute required intentional conduct by the aider and abettor. An individual cannot be found liable of the conversion statute if their acts are negligent since he or she did not have the same intent as the principle.

As previously stated by Carter Lumber, Ms. Woods states that she deceived Carter as she deceived her employer. (Exhibit 1) Further, Echelon was paying its Carter Lumber credit accounts by issuing checks drawn from Echelon's account as acknowledged by the Court of Appeals. The checks were signed by the principle of Echelon. (Exhibits 1 & 2)

It is clear that the Court of Appeals' decision creates a new cause of action. A vendor now has a duty to inquire and verify that a customer does not have an unscrupulous employee. This could be impossible in a small office as in the case of Echelon, if the only individual who answers the phone is an office manager, and that person is the "bad guy".

Such was the case in this matter. Carter contacted Echelon and Ms. Wood, Echelon's representative, admitted that she deceived Carter as she deceived Echelon.

If Echelon's principles would have supervised Ms. Wood, participated in the management and operation of their business, and conducted an audit of their checking account, then they would have discovered the irregularities long before some $600,000.00 was embezzled by Ms. Wood. Echelon's losses were solely the result of its inaction and were not the result of any action or inaction by Carter.

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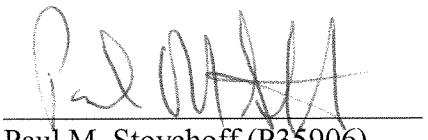
RELIEF REQUESTED

WHEREFORE, Carter Lumber requests that its Application for Leave To Appeal be granted.

Respectfully submitted,



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Dated: December 3, 2004

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